

# Responsible Lending Code

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The Responsible Lending Code was issued by the Minister of Commerce and Consumer Affairs under section 9G of the Credit Contracts and Consumer Finance Act 2003 (the Act). All provisions of the original Code came into force on 6 June 2015.

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# 1. Introduction

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## Commentary

### Lender responsibility principles

*Since 2015, the Credit Contracts and Consumer Finance Act 2003 (the Act) has set out a range of lender responsibility principles. These principles were further extended by the Credit Contracts Legislation Amendment Act 2019, and the Credit Contracts and Consumer Finance Regulations 2004 (the Regulations) as amended by the Credit Contracts and Consumer Finance Amendment Regulations 2020 and the Credit Contracts and Consumer Finance (Lender Inquiries into Suitability and Affordability) Amendment Regulations 2020.*

*The lender responsibility principles apply to every lender, defined as:*

- a. a creditor under a consumer credit contract; or*
- b. a transferee under a buy back transaction of land.*

*The lender responsibility principles and other lender obligations also apply to mobile traders, where they supply consumer goods to natural persons under a credit sale.*

*The key definitions are set out in the appendix. Any terms not defined in this Code, but which are defined in the Act or Regulations, should, unless the context indicates otherwise, be read as having the meaning set out in the Act or Regulations.*

*The lender responsibility principles require lenders to:*

- a. exercise the care, diligence, and skill of a responsible lender when advertising credit or finance, and before and after providing consumer credit or finance and taking a relevant guarantee; and*
- b. comply with specific lender responsibilities.*

### Purpose of the Responsible Lending Code

*The purpose of the Responsible Lending Code (the Code) is to elaborate on and offer guidance on how the lender responsibility principles (including the more detailed lender responsibilities) (see section 9E(1) of the Act) and the Regulations may be implemented by lenders.*

*The Regulations provide detailed obligations that lenders must undertake to fulfil their lender responsibilities under the Act. This Code provides non-binding guidance on how lenders can meet the prescribed obligations in the regulations. It also provides further guidance outside what is prescribed in the Regulations. The legislation (see section 9F(1)(b) of the Act) provides that the Code may set out certain processes, practices or procedures that a lender should follow to comply with the lender responsibility principles. The list of matters that may be set out in the Code are set out in section 9F(1) and (2) and in the appendix.*

## Status of the Code

The legislation provides that the Code is not binding. Lenders are able to comply with the lender responsibility principles in other ways.

The Code is also not a “safe harbour”. **Compliance** with the Code is not deemed to be compliance with the lender responsibility principles (see section 9E(3) of the Act). The guidance provided in the Code is not (and cannot be) an exhaustive statement of what a lender should or should not do in order to be a responsible lender.

However, **evidence of a lender’s compliance** with the provisions of the Code will be treated as evidence of compliance with the lender responsibility principles, including the specific lender responsibilities (see section 9E(3) of the Act). But evidence of compliance with the Code will be weighed against other evidence.

This document contains the following:

- a.** Statements of certain **legal obligations** including lender responsibility principles and lender responsibilities from the Act and Regulations.
- b. Guidance** – the numbered provisions of the Code (which are issued under the authority of various provisions in section 9F of the Act) sets out processes, practices and procedures which a lender should follow to comply with the lender responsibility principles and Regulations also “elaborate on” certain lender responsibility principles (see section 9E(1)(a) of the Act).
- c. Commentary and Examples** – the commentary provides information, context, and explanation, including references to various other relevant legislative provisions. The examples are for illustrative purposes only.

Evidence of compliance with the provisions of the Code labelled as “Guidance” are to be treated as evidence of compliance with the lender responsibility principles. The sections labelled “Commentary” and “Examples” do not purport to set out additional processes, practices, or procedures for lenders to follow and they are not provisions of the Code against which evidence of compliance is to be assessed.

## Structure of the Code

The structure of the Code is based around the lender responsibility principles broadly in the order that they would apply throughout the life cycle of a credit agreement. The Code is divided into the following sections:

- a.** Obligations that apply before and throughout the agreement
- b.** Advertising
- c.** Inquiries into and assessment of borrowers’ requirements and objectives
- d.** Inquiries into and assessment of substantial hardship
- e.** Assisting borrowers to make an informed decision
- f.** Assisting guarantors to make an informed decision
- g.** Credit related insurance and repayment waivers
- h.** Fees
- i.** Subsequent dealings
- j.** Default and other problems
- k.** Repossession

## *I. Oppression*

### Different products and circumstances

*The Code provides:*

- a. the extent of reasonable inquiries a lender should undertake; and*
- b. the extent of assistance a lender should provide*

*to comply with the relevant lender responsibilities may differ depending on factors relating to the credit agreement or the borrower (as set out in the relevant sections of the Code).*

*For instance, to assess whether a borrower will make repayments without substantial hardship, the lender should conduct more detailed inquiries for products or borrowers where the consequences of default are serious or there is a greater risk of default.*

*The lender can make a judgement as to the extent of inquiries, as well as the extent of assistance, that should be provided for any given transaction based on the factors set out in the relevant section of the Code. However, the lender should be satisfied that the extent of inquiries and assistance is reasonable and will be sufficient to comply with the lender responsibility principles, including the requirements set out in the Regulations.*

*Whether credit is provided online or in-person is not one of the factors which affects the extent of inquiries or extent of assistance. The guidance in the Code is intended to be technology neutral in the sense that:*

- a. a lender should be able to comply with the guidance in the Code when lending online or in-person.*
- b. the level of responsibility for lenders (and the level of consumer protection provided) should not be lower for any particular lending channel used, although the steps that lenders take to achieve compliance with the guidance in the Code may differ depending on the lending channel.*

*Regardless of the channel a lender uses to interact with a borrower, the lender should take sufficient steps to meet the lender responsibility principles.*

*The Code also provides in various provisions throughout this document that lenders should act “reasonably” or act within a “reasonable time”. What is reasonable will depend on the circumstances, including the circumstances of the lender and the borrower, and the nature of the product.*

### Disclaimer

*The Code does not constitute legal advice. Lenders are encouraged to seek their own professional advice on how the credit contracts and consumer finance laws in New Zealand apply.*

*This version of the Code was issued in February 2021. The Code may be amended from time to time. Where changes are proposed to the Code (other than minor changes), parties that are substantially affected (or their representatives) will be consulted. There may also be developments in case law which further elaborate on the lender responsibility principles.*

## 2. Obligations that apply before and throughout the agreement

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### Legal obligations

#### Lender responsibility principles

*Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender:*

- *in any advertisement for providing credit or finance under an agreement; and*
- *before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and*
- *in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee (see s 9C(2)(a) of the Act).*

*Every lender must, at all times, comply with all the lender responsibilities specified in sub-sections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

### Commentary

*Lender responsibility principles (and their associated lender responsibilities) are the core provisions of the Part 1A of the Act.*

*To comply with these principles, a lender must comply with all of the specific lender responsibilities, including requirements in the Regulations. The Code provides further guidance and elaboration on how a lender could meet those responsibilities and requirements. If the lender breaches any of the lender responsibilities, it is likely that they will also have breached the lender responsibility principle to act with care, diligence, and skill.*

*The principle that lenders must at all times exercise care, diligence, and skill is a standalone responsibility which, depending on the circumstances of lending, is likely to require a lender to adopt practices additional to those prescribed as lender responsibilities.*

*Lenders will need to identify any changes to their lending practices that are necessary to comply with the lender responsibility principles. Depending on the nature, size and complexity of the lender's business, these practices may be referred to, or codified in, formal policies and procedures that govern aspects of the lender's operations. These policies and procedures may need to be revised, and staff and agents acting on the lender's behalf will need to be adequately trained.*

*Where relevant, this Code sign-posts specific legal obligations that are likely to be particularly relevant at various points during the life cycle of a credit agreement, although it does not provide an exhaustive list. For instance, see section 3 in relation to processes for compliance with the Fair Trading Act 1986 and section 13 in relation to parts of the repossession obligations under the Act.*

*The Code does not offer guidance on how lenders can comply with all legal obligations. Compliance with the guidance in the Code is not evidence that lenders will be complying with any legal obligations other than the lender responsibility principles set out in section 9C of the Act.*

*The Fair Trading Act 1986 imposes obligations independently of this Code. Case law under the Fair Trading Act may be useful in ascertaining whether a lender has complied with the Act and the provisions of the Code relating to advertising that is, or is likely to be misleading, deceptive or confusing to borrowers. Neither the Act nor Code limits the application of the Fair Trading Act.*

*The Human Rights Act 1993 prohibits discrimination on a number of grounds including sex, marital status, colour, race, family status, disability, age and employment status. Lenders must not refuse credit, or make it more difficult to obtain, on any of the prohibited grounds. What is required in each case is an individualised assessment of all of the borrower's circumstances to assess how the principles apply to that particular borrower.*

*The guidance in this Code is not intended to require lenders to provide financial advice under the Financial Markets Conduct Act 2013 in order to comply with that guidance. However, lenders must comply with the Financial Markets Conduct Act when financial advice is given. Lenders need to be familiar with the requirements of the Financial Markets Conduct Act and understand when financial advice is given and the restrictions on who may provide financial advice.*

## Guidance

### Compliance policies, procedures and training

- 2.1.** Lenders should develop and implement the policies, procedures and training that are necessary to ensure ongoing compliance with the lender responsibility principles.

### Ensuring compliance

- 2.2.** A lender should take reasonable steps to require and monitor compliance with its policies and procedures, and the lender responsibility principles. This may include lenders:
  - a. requiring staff and agents acting on the lender's behalf to comply with the policies and procedures relevant to their role;
  - b. being satisfied that staff and agents acting on the lender's behalf understand what they should do to comply with the relevant policies, processes and practices, and the lender responsibility principles, before those staff and agents come into contact with borrowers;



- c. monitoring compliance with the relevant policies and procedures and lender responsibility principles by staff and agents acting on the lender's behalf, and addressing any breaches of those measures;
- d. regularly reviewing policies, procedures and training for compliance with lenders legal obligations; and
- e. confirming with agents acting on the lender's behalf that they have appropriate practices in place to ensure that the agents and their staff understand and will comply with the lender's relevant policies and procedures and the lender responsibility principles. A lender could choose to develop policies or training specifically for agents to implement. For instance, a finance company could develop policies for point-of-sale retailers to implement.

## Reviewing policies, procedures and training

- 2.3.** A lender should also monitor and review policies, procedures, and training so they continue to deliver compliance with the lender responsibility principles and the lender's legal obligations. This should include reviewing, at regular intervals, complaints that have been through the lender's internal complaints process and the lender's dispute resolution scheme to assess whether they indicate problems that should be addressed.

## Record-keeping

### Commentary

*Under section 9CA of the Act, a lender must keep specific records about the inquiries made by the lender under section 9C (including the results of those inquiries) (see Chapters 5 and 6).*

*This section provides guidance on records that lenders should keep in respect of other lender responsibilities.*

- 2.4.** A lender should make and keep records that show how the lender complies with lender responsibility principles and the Guidance in the Code.
- 2.5.** The records could, for instance, be in the form of:
- a. the policies and procedures referred to above, and records of the steps the lender has taken to ensure compliance with those policies, such as training, monitoring and enforcement; and
  - b. records of actions taken by the lender in specific transactions.
- 2.6.** The records may also be in some other form. Regardless of the approach taken, the records should contain sufficient detail to show how a lender complies with lender responsibility

principles and the Guidance in the Code, including the matters that are left up to individual discretion.

## Commentary

*The above guidance reflects that to be able to demonstrate and evidence compliance with the lender responsibility principles and the Code, lenders are likely to need to document and record relevant lending practices.*

*However, the fact that a lender complies with the record keeping Guidance set out at 2.4 above does not mean that a Court or dispute resolution scheme will accept those records as sufficient proof of the actions a lender took in any individual transaction.*

## Commentary

### Agents and other lenders

*Under the Act, lenders are responsible for the conduct of their agents acting within the scope of their authority. Agents of a lender can include third party debt collection or repossession businesses, or retailers or motor vehicle dealers that facilitate access to credit at the point of sale.*

*In some circumstances, dealers or retailers may be a lender, such as when they enter into a consumer credit contract with a customer and then assign their rights under the agreement to a finance company. A person who has the rights of a creditor transferred to them (by assignment or operation of law) may also be a lender. All of those businesses or persons who are lenders will be subject to the lender responsibility principles.*

*Lenders (including any dealers, retailers, debt collectors, repossession businesses or brokers that are lenders) may contract another person (such as the actual party providing the credit) to provide services or take action in order to meet the lender responsibility principles. For instance, for a retailer, the policies referred to at 2.1 may be policies provided by the finance company for the retailer to apply, under the contract between the finance company and the retailer.*

*Any such contractual arrangement does not affect the obligations or liabilities of those lenders under the Act.*

## Contacting borrowers and guarantors

**2.7.** When contacting a borrower or guarantor by any means, a lender should:

- a. take steps to verify they are dealing with the borrower (or guarantor), a person who is authorised to act on the borrower's (or guarantor's) behalf, or a contact provided by the borrower (or guarantor);
  - a. having established that they are dealing with one of the persons in 2.5.a, identify themselves, the name of the lender, and the purpose of the contact;
  - b. comply with their obligations to not disclose information about the borrower and guarantor to third parties under the Privacy Act 1993, and in addition, avoid indirectly revealing the borrower or guarantor's personal information to others to the extent practicable (such as by leaving messages with a workmate that reveal that the inquirer is a lender); and
  - c. if authorised by the borrower (or guarantor), co-operate with the borrower's or guarantor's advisors, including, where possible, by giving those advisors the information the advisor needs to advise a borrower or guarantor.
- 2.8.** If the borrower or guarantor indicates a preferred channel of communication, then the lender should make reasonable efforts to contact the borrower or guarantor using that channel unless it is impractical to do so.
- 2.9.** Where possible, a lender should contact a borrower or guarantor at reasonable hours (i.e. between 8am and 9pm), taking into account all the circumstances and the borrower's reasonable wishes.

## Working with borrower representatives

- 2.10.** This part of the Code provides guidance for lenders when working with borrower representatives. A borrower representative can either be a person acting in their professional capacity, such as a financial mentor<sup>1</sup>, lawyer or advocate, or acting in their personal capacity as a family or whānau member or friend.
- 2.11.** Where a borrower requests that the lender work directly with their representative, a lender should do so in good faith. This includes working constructively and collaboratively with a borrower's representative towards a mutually agreeable solution for both the borrower and lender. A lender may refuse to work with a representative if the lender reasonably believes that the representative is not acting in the interests of the borrower.
- 2.12.** Before a lender works with a representative, a borrower must provide a privacy waiver or authorisation form, acceptable to the lender's requirements, which gives the representative the authority to act on their behalf. Pending satisfaction of appropriate checks, such as verification by the lender that the waiver is time-bound and specific, the lender should accept

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<sup>1</sup> A financial mentor is a person employed by or volunteering for a not-for-profit financial capability and budgeting service recognised by FinCap.

the privacy waiver as proof that the representative is acting for the borrower. Lenders may refuse a waiver where it does not meet the requisite standards or verification.

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# 3. Advertising

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## Principle

*Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender in any advertisement for providing credit or finance under an agreement (see section 9C(2)(a)(i) of the Act).*

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

## Lender responsibilities

*A lender must, in relation to an agreement with a borrower, assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that any advertising:*

- *complies with the advertising standards set out in the regulations; and*
- *is not, or is not likely to be, misleading, deceptive, or confusing to borrowers (see s 9C(3)(b)(i) of the Act).*

*A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Markets Conduct Act 2013 (see section 9C(3)(f) of the Act).*

## Regulations - advertising minimum standards

*As part of complying with the lender responsibility in section 9C(3)(b) of the Act, lenders must comply with the minimum advertising standards prescribed in regulations 4AAAQ–4AAAU. These regulations require that lenders advertising consumer credit must ensure their advertisements comply with the following:*

- *if the advertisement states a payment amount, it must also display the total amount of payments if ascertainable, or the annual interest rate or rates for the advertised products and (for credit sales) information about lump sum payments;*
- *if the advertisement includes an interest rate, it must also state the annual interest rate or range of rates that may apply as well as any mandatory credit fees;*
- *if a lender advertises no interest credit contracts, the advertisement must include any mandatory credit fees; and*
- *advertisements for high-cost consumer credit must include a prominent risk warning that it should not be used for long-term borrowing.*

*Lenders are prohibited from certain advertising practices such as making certain representations in their advertisements that lenders will not inquire into the borrower's circumstances (for example, "no credit checks").*

# Guidance

## “Confusing”

- 3.1.** A lender should comply with the following general practices to ensure that advertising is not confusing:
- a. set out advertisements in a way that allows them to be readily understood by the intended audience;
  - b. make sure key information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with its importance;
  - c. use concise, plain and clear language; and
  - d. use technical language and statistics only where they are relevant and in a way that can be readily understood by consumers without specialist knowledge.

### Commentary

#### Content of advertising – “misleading” and “deceptive”

*Existing provisions under the Fair Trading Act prohibit:*

- *misleading and deceptive conduct; and*
- *unsubstantiated representations.*

*To comply with the Fair Trading Act 1986 and to ensure that advertising is not and is not likely to be misleading or deceptive, a lender should refer to the Commerce Commission’s Fair Trading Act fact sheets and other guidance for general practices. Lenders can also refer to relevant industry codes including the Advertising Standards Authority’s Code for Financial Advertising. In particular, lenders should:*

- *have reasonable grounds for making any claim (other than puffery (i.e. obvious exaggeration));*
- *only use fine print to elaborate on the main selling message, not to contradict it;*
- *disclose any conditions that are unusual, inconsistent with, or modify, in an unexpected manner, the main message of the advertisement; and*
- *only make comparisons between sufficiently like products.*

*Note that the test under the lender responsibility differs from that set out in the Fair Trading Act 1986 in that the lender responsibility also includes ensuring that advertising is not confusing (see section 9C(3)(b)(i) of the Act).*

## High-cost credit agreements

- 3.2.** To comply with the above lender responsibility principles and lender responsibilities, a lender should when using a celebrity to advertise high-cost credit, include the risk warning required by regulation 4AAB as part of the message conveyed by the celebrity.

## Processes

- 3.3.** To comply with the above lender responsibility principle and lender responsibilities and regulations, a lender should have policies or procedures in place to ensure that advertising complies with their legal obligations and is not misleading, deceptive, or confusing. Such policies or procedures can also include complying with relevant industry codes.
- 3.4.** A lender's policies or procedures should aim to ensure that:
- a. relevant staff and agents acting on the lender's behalf are required to comply with the Act, regulations, Fair Trading Act 1986 and follow the Guidance in this Code and other relevant guidance from regulatory bodies and the lender is satisfied they understand how to do so;
  - b. relevant sales staff and agents acting on the lender's behalf are adequately informed of current promotions and representations about credit products;
  - c. all advertising material is subject to an approval process;
  - d. advertising is checked by a staff member with necessary product knowledge to ensure that the description is accurate; and
  - e. the need for legal advice is considered when advertisements are being developed.

### Commentary

*A lender should refer to the Commerce Commission's Fair Trading sample compliance policy for further guidance on an appropriate compliance process.*

### Online advertising and prominence requirement

*Lenders should refer to Commerce Commission guidance relating to online advertising and guidance around the meaning of prominence as required in the regulations.*

## 4. Inquiries into and assessment of borrowers' requirements and objectives

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### Lender responsibility

*A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that the credit or finance provided under the agreement will meet the borrower's requirements and objectives (see s 9C(3)(a)(i) of the Act).*

### Regulations - minimum requirements for inquiries and assessment

*As part of complying with the lender responsibility in section 9C(3)(a)(i) of the Act, lenders must comply with the minimum requirements for inquiries and assessment prescribed in regulations 4AA and 4AB.*

#### Commentary

*The effect of the Act and the Regulations is that lenders must:*

- *determine particular aspects of the borrower's requirements and objectives prescribed by regulation 4AA and 4AB, such as the amount of credit or finance that the borrower seeks, and the purpose of the credit or finance*
- *make other reasonable inquiries required by section 9C(3)(a)(i) (the inquiries mandated by the regulations are non-exhaustive)*
- *make the assessment required in section 9C(3)(a)(i), taking into account the results of complying with the relevant regulation and any other reasonable inquiries required by section 9C(3)(a)(i).*

### Guidance



## There may be a range of products that will meet the borrower's requirements and objectives

- 4.1.** To meet this lender responsibility and comply with regulation 4AA and 4AB, the lender's inquiries and assessment can take into account that there may be a range of products that meet the borrower's requirements and objectives. A credit agreement may have a number of different features, and there may be trade-offs between those features. The lender does not need to assess whether the proposed agreement best meets the borrower's requirements and objectives, but should be satisfied that it is likely that the product is within the range of products that will meet the borrower's requirements and objectives.

## General scope and methods of inquiry

- 4.2.** A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to determine the matters specified in regulations 4AA and 4AB and be satisfied that it is likely that the credit agreement will meet the borrower's requirements and objectives.

## Scope of inquiries

- 4.3.** The inquiries specified in regulations 4AA and 4AB are non-exhaustive. Depending on the circumstances, it may be reasonable for the lender to make inquiries into other matters to be satisfied that it is likely that the credit will meet the borrower's requirements and objectives.

### Commentary

#### Material changes to an agreement

*Regulation 4AA(2)(b) provides that if a material change is being made to an agreement (as defined in section 9C(8)), the lender must determine certain aspects of the borrower's requirements and objectives to the extent that they are relevant to the material change.*

## Method of inquiries

- 4.4.** In making reasonable inquiries, a lender may obtain information:
- a. directly from the borrower;
  - b. that it holds about the borrower, provided the lender is satisfied that the information is current; or
  - c. about the borrower from reliable third parties.

## Example

*Lender A wishes to provide personal loans online. Lender A is required to inquire into the timeframe for which credit is sought. One way that Lender A could inquire into the timeframe for which credit is sought is by including a question in its application form asking the term of the loan that the borrower is seeking, along with multiple-choice options.*

- 4.5.** A lender may ask for or receive information from financial advisers or other intermediaries acting on behalf of the borrower. Where that is the case:
- a. A lender may treat the information provided to it by a financial adviser or intermediary as though it had been provided to it by the borrower.
  - b. A lender should require financial advisers to implement and maintain appropriate policies and procedures to collect information from the borrower and perform any necessary verification, and for the financial advisers to train their staff on the Code and the lender responsibility principles.
  - c. Ultimately, the responsible lending obligations are obligations placed on lenders, not financial advisers or other intermediaries. Even if a lender relies on a financial adviser or other intermediary to collect and verify information provided by a borrower, the lender still needs to ensure they comply with their responsible lending obligations once they receive this information from the financial adviser or other intermediary.

Determining aspects of the borrower's requirements and objectives may be an iterative process

### Commentary

*Regulation 4AA(2) and 4AB(2) require the lender to make reasonable inquiries in order to determine various specific aspects of the borrower's requirements and objectives (e.g. the amount of credit the borrower seeks). Once the lender has determined these requirements and objectives, regulation 4AA(3) and 4AB(4) require the borrower to compare them against the agreement (or relevant insurance contract) in order to assess whether the agreement or contract meets those requirements and objectives.*

*The use of 'determine' in this context means that the lender needs to make inquiries in order to come to a view about the aspects of the borrower's requirements and objectives specified. There is flexibility as to how the lender does so. Given that borrowers will sometimes not come equipped with a detailed and well-articulated understanding of their requirements and objectives (e.g. a view about the term of the loan that would suit them, or whether they want to finance a repayment waiver), some iteration between the lender and the borrower may be required.*

- 4.6.** Lenders may make a series of iterative inquiries to determine the borrower's requirements and objectives. For example, a lender may determine the borrower's requirements and objectives through the following steps:

- a. asking the borrower about their requirements and objectives;
- b. discussing available products with the borrower;
- c. working with the borrower to refine their requirements and objectives; and
- d. finally confirming that the product is likely to meet their requirements and objectives (as refined with the borrower and understood by the lender).

### Conflicts between the customer's requirements and objectives

- 4.7.** Borrowers may specify requirements and objectives that are in conflict with each other. For example, a borrower entering into a home loan may specify that they want certainty of the amount of their payments for a period (which would require a fixed interest rate loan), but certainty also flexibility to pay in lump-sum amounts (which would require a floating interest rate loan). Where this is the case, lenders should:
- a. in accordance with their obligations under section 9C(3)(b), assist the borrower to reach an informed decision as to the relevant implications of the proposed agreement; and
  - b. determine which of the conflicting requirements and objectives are the borrower's highest priority (for example, by asking the borrower to choose) and take this as the borrower's requirement or objective.

### Extent of inquiries

- 4.8.** The scope and method of inquiries that are reasonable for a lender to make to meet this lender responsibility may differ depending on the circumstances. A lender should make more extensive inquiries where there is a greater risk that the agreement will not meet the borrower's requirements and objectives. This includes where:
- a. the agreement is complex or uncommon, such as a buy-back transaction or reverse equity mortgage;
  - b. the agreement is a high-cost credit agreement; or
  - c. the borrower is a **vulnerable borrower**.
- 4.9.** A lender may undertake less extensive inquiries (subject to complying with the regulations) where there is a low risk that the agreement will not meet the borrower's requirements and objectives. This includes where:
- a. the agreement is a simple credit agreement that is widely understood, such as an overdraft; or
  - b. the borrower is a well-informed user of credit.
- 4.10.** Lenders should also undertake further inquiries to about the borrower's requirements and objectives, if all of the following apply:

- a. the information material to the assessment;
- b. the potential further inquiries are reasonably practicable; and
- c. one or more of the following apply:
  - i the information is inconsistent or contradicts other information provided by the borrower or known to the lender;
  - ii the information is unrealistic; or
  - iii the lender has other reasonable grounds to suspect that the information is not reliable.

## Guidance on specific situations

### Buy-back transactions

- 4.11.** For buy-back transactions, a lender's inquiries should include (as part of the inquiry into product features or flexibility) whether the borrower wishes to transfer ownership of their home to the lender.

### Material changes

#### Commentary

*Regulation 4AA(2)(b) provides that if a material change is being made to an agreement (as defined in section 9C(8)), the lender must determine certain aspects of borrower's requirements and objectives to the extent that they are relevant to the material change.*

- 4.12.** When a material change is proposed, a lender should determine the aspects of the borrower's requirements objectives listed in regulation 4AA(2)(a)–(i) if these aspects will change from the original agreement. For example, in respect of a loan 'top-up', the lender may make inquiries to determine the amount of the top-up that the borrower seeks, the purpose of the top-up, and (if the term of the loan is proposed to change) the new loan term that the borrower requires. Other requirements and objectives could be relevant, for example if the change will finance additional fees or charges. Lenders are not required to reassess whether the original agreement meets the borrower's requirements and objectives.

## Record keeping

**4.13.** The lender should keep a record of:

- a. any specific inquiries made to meet Regulations 4AA and 4AB;
- b. any other inquiries made to meet section 9C(3)(a)(i);
- c. In recording the borrower's purpose in seeking the credit or material change or refinancing, the lender may capture a concise summary, for example:
  - i purchase an asset (eg residential property, car, whitegoods);
  - ii use for a specific purpose (eg holiday);
  - iii have ongoing access to credit; or
  - iv refinancing to preferred provider.

**4.14.** In recording how the lender satisfied itself as to the matters in section 9C(3)(a)(i), the lender may choose to capture a concise summary of the lender's decision. For example:

- a. the product was the only product offered likely to meet the borrower's requirements and objectives;
- b. the product offered was within the range of products likely to meet the borrower's requirements and objectives; or
- c. multiple products offered that were likely to meet the borrower's requirements and objectives – customer selected from those options.

# 5. Inquiries into and assessment of substantial hardship (borrowers)

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## Legal obligations

### Lender responsibility

*A lender must, in relation to an agreement with a borrower, make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that the borrower will make the payments under the agreement without suffering substantial hardship (see s 9C(3)(a)(ii) of the Act).*

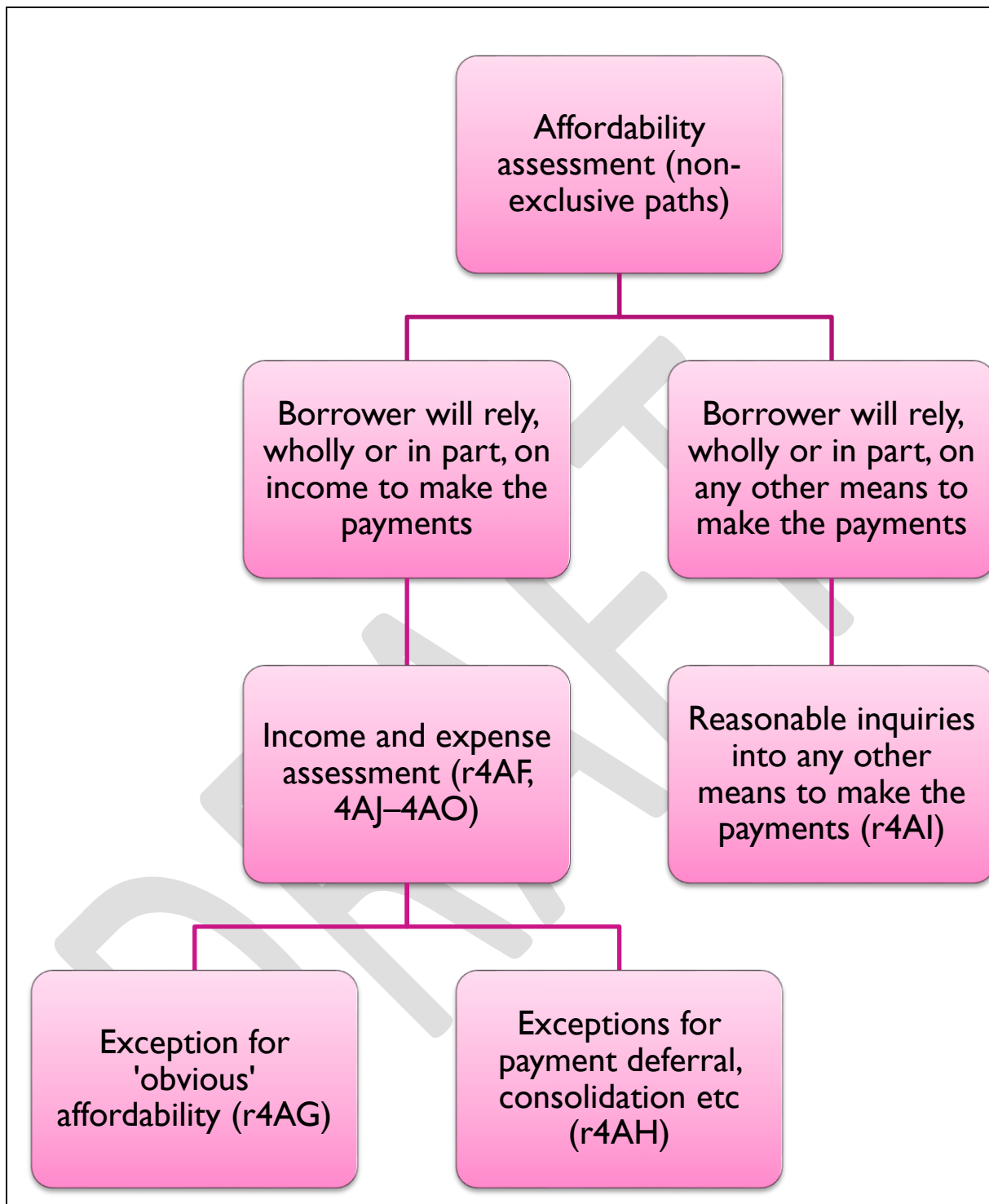
### Regulations - minimum requirements for inquiries and assessment

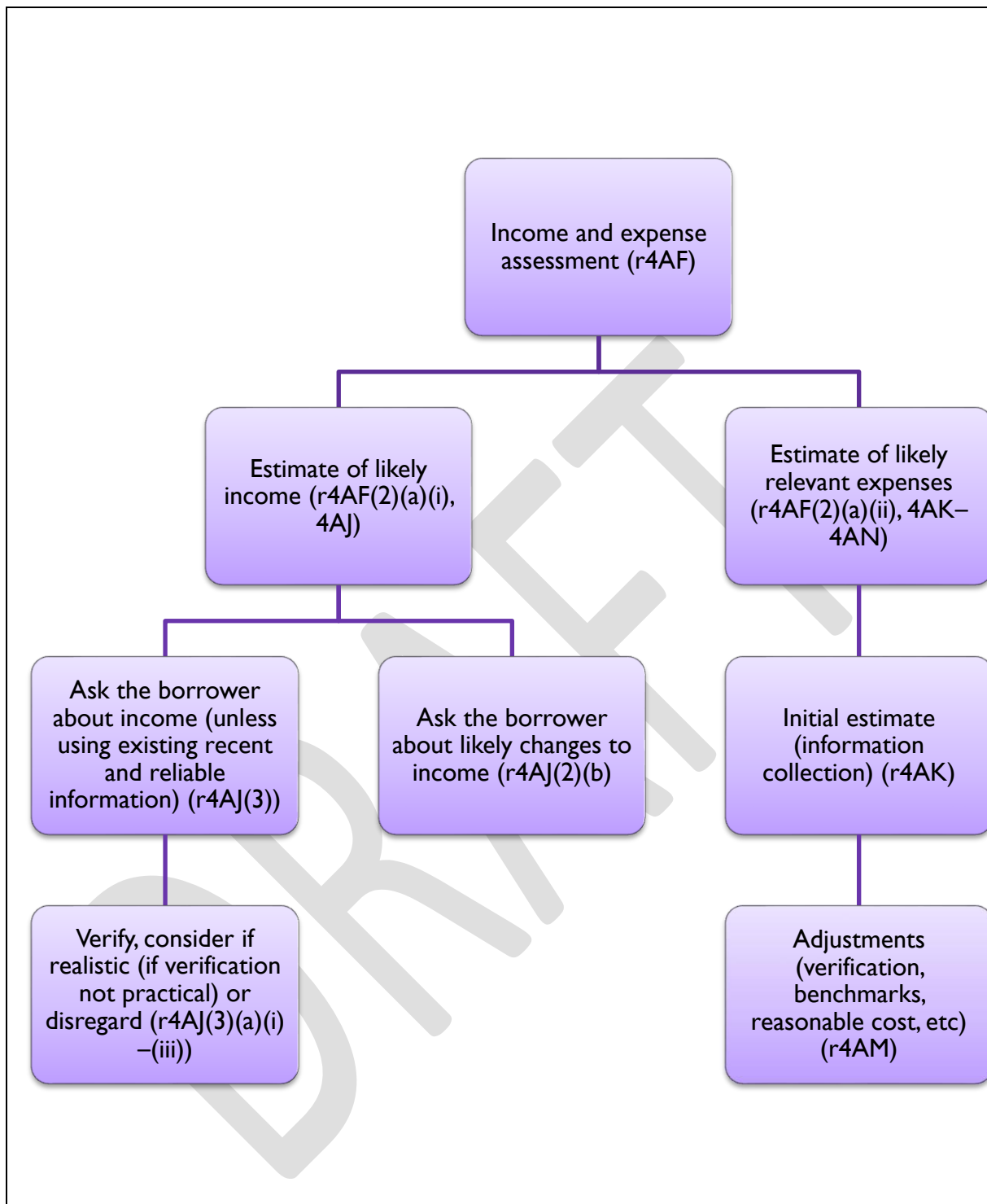
*As part of complying with the lender responsibility in section 9C(3)(a)(ii) of the Act, lenders must comply with the minimum requirements for inquiries and assessment prescribed in regulations 4AE–4AO.*

### Commentary

*Regulation 4AD provides an outline of regulations 4AE–4AO, which set out requirements for making reasonable inquiries about the likelihood that the borrower will make the payments under the agreement without suffering substantial hardship.*

*Below is a diagram of this process.*





## Guidance

## Inquiries



- 5.1. A lender should be confident that the scope and methods of inquiry are reasonable and will provide satisfaction that it is likely that the borrower will make payments under the agreement without suffering substantial hardship.

### Commentary

*Regulations 4AF and 4AJ–4AO require lenders to make particular inquiries into the borrower’s income and expenses.*

- 5.2. Depending on the circumstances, it may be reasonable for the lender to make inquiries into other matters to be satisfied that it is likely that the borrower will make payments without suffering substantial hardship.

### Verification – affordability

- 5.3. Subject to requirements in the regulations to verify particular information about income and expenses, lenders may rely on the information provided to them by the borrower unless the lender has reasonable grounds to believe that the information is not reliable.
- 5.4. Where the lender has reasonable grounds to believe the information is not reliable, the lender should take reasonable steps to verify the information provided by the borrower.
- 5.5. A lender may ask for or receive information from brokers or other intermediaries acting on behalf of the borrower. Where that is the case:
- a. A lender may rely on information provided to it by a broker or intermediary as though it had been provided to it by the borrower.
  - b. A lender should require brokers to implement and maintain appropriate policies and procedures to collect information from the borrower and perform any necessary verification, and for the broker to train their staff on the Code and the lender responsibility principles.

### Surpluses, buffers or adjustments

#### Commentary

*This part of the Code provides guidance on how lenders should assess the adequacy of surpluses, buffers or adjustments provided in accordance with regulation 4AF(2)(b).*

*Regulation 4AF(2)(b) requires that the surplus, buffers or adjustments adequately address the risks that likely income may be overestimated, likely expenses may be underestimated or the borrower may need to incur other expenses that cause them to suffer substantial hardship.*

- 5.6.** Lenders should incorporate surpluses, buffers or adjustments as part of their income and expense assessments to reduce the risk that the borrower may suffer substantial hardship as a result of income being overstated, expenses being understated or the borrower needing to incur other expenses.
- 5.7.** Lenders should seek to have a consistent set of buffers or adjustments across credit products the lender offers to help reduce the risk that income is overstated or expenses understated.
- 5.8.** However, lenders may apply different buffers or adjustments across credit products to reflect, the different risks of those products. For example, a lender may apply a different uncommitted monthly income requirement for a lower risk personal loan compared to a higher risk home loan.
- 5.9.** Whilst the amount of buffer or adjustment is not prescribed, the amount must be reasonable. The determination of what is reasonable will depend on the nature of the credit provided and the risk that income is overstated or expenses understated. For example, a buffer or adjustment may depend on the size, term or revolving nature of the credit product. A surplus, buffer or adjustment may be a percentage amount or an absolute amount.
- 5.10.** Where the interest rate under the agreement can vary, a lender should take account of the risk that interest rates may rise. Lenders should consider applying buffers to the loan's interest rate, to mitigate the risk that potential increases in the interest rate adversely impact on a borrower's capacity to repay. For example, lenders could:
- a. use a single, sensitised interest rate (which includes a buffer) regardless of the loan's actual interest rate or use the loan's actual interest rate plus a margin (which functions as a buffer);
  - b. apply an interest rate floor, to ensure the interest rate buffer applied reflects higher likely average interest rates over the longer term when operating in a low interest rate environment.
- 5.11.** For interest only loans, where the interest only period is shorter than the term of the loan, lenders should consider assessing the borrower's ability to repay the loan on a principal and interest basis, excluding the interest-only period. For example, if the loan's term is 5 years, and the interest-only period will be 1 year, the lender should assess affordability over 4 years.
- 5.12.** Lenders should consider adjusting volatile, irregular, or variable income, like discounting seasonal income, bonuses, overtime, rental income, or investment returns.

## Payments where there is an option to extend a loan term

- 5.13.** Where the borrower asks for a loan term that is shorter than the maximum available for that credit product, lenders may assess the borrower's ability to repay the credit over a longer loan term, if all of the following reply:

- a. the lender has told the borrower that the longer agreement term is available, but the borrower wants to keep a shorter term as more suitable for them;
- b. the borrower has a right to extend the term of the loan up to the longer term at any time without fee, and the borrower is aware of this ability;
- c. the borrower is aware that repaying over a shorter term may require more financial commitment or a further reduction in expenses; and
- d. the agreement is not a high-cost consumer credit contract.

### Example

*The borrower is seeking a home loan of 25 years, but the maximum available for that product that the borrower can obtain is 30 years. The lender may assess the borrower's ability to repay the credit over 25 years, or over a longer period, up to 30 years.*

### Joint expenses

#### Commentary

*This part of the Code provides guidance on how lenders should estimate a borrower's likely expenses when a borrower shares expenses with others.*

*Some of the borrower's expenses may be shared with other people (for example, a partner, spouse, or extended family).*

- 5.14.** Where the lending is joint between two or more borrowers, the lender should consider each borrower's individual expenses, any expenses the borrowers share together, and any expenses each borrower shares with any other person.
- 5.15.** Where the lending is to one borrower, the lender should consider that borrower's individual expenses, and any expenses that borrower shares with any other person.
- 5.16.** When estimating the borrower's likely expenses, lenders should consider whether it is appropriate to apportion shared expenses in the circumstances, whether a known amount for that borrower's individual contribution to the shared expenses is reasonable and can be used (for example, a borrower who is in a flatting situation contributes \$50 a week towards power) or whether to apply the whole amount of the expense.
- 5.17.** In considering how to apportion shared expenses, the lender should take into account any information provided by the borrower about how their expenses are apportioned between them and others.
- 5.18.** Lenders should consider the approach they'll take when apportioning shared expenses to reduce the risk that the expenses are underestimated. The lender could consider whether apportioning expenses based on the salary of the borrower and other parties is appropriate in

the circumstances. If relevant, the lender should also consider whether the apportionment itself is likely to change over the relevant period. For example:

- a. if the partner of an individual borrower will be going on maternity leave in 2 months, and it is likely the proportion of expenses the borrower will need to meet will increase from 50% to 90%
- b. if a tenant with their name on the house lease shares rent with flatmates who are not on the lease, the lender should consider whether there is a risk that the tenant will become liable for a greater share of rent.

## Record keeping

### Commentary

*This part of the Code illustrates the kind of information that lenders should consider keeping to meet sections 9CA(1) and (2) of the CCCFA.*

*Lenders are required to ensure their records are fit for their intended purpose, including disclosure on demand to the Commission, dispute resolution service, the borrower, or guarantor.*

*However, the way information is presented by a lender under section 9CA(3) to (6) may depend on the way in which the lender collected and recorded information, verified that information where required, and made its assessments under section 9C(3)(a), (4)(a), and (5)(a).*

- 5.19.** Where the lender will follow the approach in Regulation 4AF, the lender should keep a record of:
- a. the borrower's likely income on a weekly, fortnightly, or monthly basis;
  - b. the reliable evidence for that likely income or, if verification was not reasonably practicable, a concise summary as to why the source and amount were realistic ;
  - c. a statement about any likely changes to the borrower's income disclosed by the borrower;
  - d. the borrower's likely relevant expenses on a weekly, fortnightly, or monthly basis;
  - e. a list of relevant expenses and the estimates used by the lender for each;
  - f. where those likely relevant expenses were derived by using 90 days' of transaction records or other reliable evidence, copies of that information;
  - g. any information or documents obtained when making reasonable inquiries into whether financial commitments were omitted, like a credit report;

- h. where those likely relevant expenses were derived by asking the borrower and were verified by using 90 days' of transaction records or other reliable evidence, copies of that information;
- i. where those likely relevant expenses were derived by asking the borrower and some benchmarkable expenses were compared against a benchmark, a list of the relevant expenses that were benchmarked, and the benchmark amount applied;
- j. where any likely relevant expenses were derived by estimating a reasonable cost for the expense, a statement to that effect and a list of relevant expenses that were estimated;
- k. where any living expenses were compared to a reasonable minimum cost of living for a person in similar circumstances to the borrower, a statement to that effect and a list of relevant expenses that were adjusted;
- l. if a buffers or adjustment was applied to income or a relevant expense, the amount applied; and
- m. any other inquiries made under section 9C(3)(a)(ii).

**5.20.** In recording how the lender satisfied itself as to the matters in section 9C(3)(a)(ii) where the approach in Regulation 4AF was followed, the lender may choose to capture a concise summary of the lender's decision or some other record of how the lender satisfied itself. This may include references to its policies or procedures and how they were applied. For example, the lender could keep a record summarising that:

- a. the lender was satisfied based on inquiries made that the borrower's likely income of \$(amount) exceeded their likely relevant expenses of \$(amount); and
- b. the lender was satisfied based on inquiries made that:
  - i. there was a reasonable surplus to adequately address the risk likely income may be overestimated, likely relevant expenses underestimated, or that the borrower may need to incur other expenses that cause them to suffer substantial hardship;
  - ii. the lender's estimates of likely income and likely relevant expenses included reasonable buffers or adjustments to adequately address the risk likely income may be overestimated, likely relevant expenses underestimated or that the borrower may need to incur other expenses that cause them to suffer substantial hardship.

**5.21.** Where the lender will follow the approach in Regulation 4AI, the lender should keep a record of any specific inquiries made into the means by which the borrower intends to make the payments under the agreement, including any documents or information relied on.

**5.22.** In recording how the lender satisfied itself as to the matters in section 9C(3)(a)(ii) where the approach in Regulation 4AI was followed, the lender may choose to capture a concise summary of the lender's decision. For example:

- a. the lender was satisfied based on inquiries made that the borrower has listed their existing property for sale and the likely sale proceeds will be sufficient to repay the lending by the end of the loan term;
- b. the lender was satisfied based on inquiries made that the borrower has funds on term deposit that will be sufficient to repay the lending by the end of the loan term.

**5.23.** Nothing in the requirements in section 9CA require a lender to disclose or explain to a borrower:

- a. personal information that relates to another borrower or any other person;
- b. commercially sensitive information about how buffers or adjustments are applied to specific income or specific relevant expenses;
- c. commercially sensitive information about how benchmarks are derived; or
- d. which specific expenses were assessed against a benchmark, reasonable cost estimate, or reasonable minimum cost of living, or the extent to which those expenses were adjusted.

## High-cost consumer credit contracts

### Commentary

*This part of the Code provides guidance for lenders under high-cost credit agreements when assessing whether the borrower has existing high cost loans or has had high cost loans within the preceding 90 days.*

*Under s 45F and s 45G of the Act, lenders are prohibited from entering into high-cost credit contracts with certain borrowers. Regulation 4AI applies a presumption of substantial hardship if the lender has reasonable evidence that the borrower has defaulted in payment on a consumer credit contract in the preceding 90 days.*

*In the case of a high-cost consumer credit contract, a lender may not enter into a high cost credit contract with a debtor who:*

- *has unpaid balance on any high-cost consumer credit contract with another creditor (s 45F(1)(a));*
- *has had, at any time within the preceding 15 days, an unpaid balance on any high-cost consumer credit contract with another creditor (s 45F(1)(b));*
- *has entered into 2 or more high-cost consumer credit contracts at any time within the preceding 90 days (s 45G(1)); or*
- *has been in default under one or more loans in the preceding 90 days. (see s 45F, s 45G and reg 4AI).*

## Lender's inquiries

**5.24.** In making reasonable inquiries, a lender should obtain information through all of the following:

- a. explaining to the borrower what a high-cost loan is;
- b. asking the borrower if they have entered into any high-cost loans in the past 90 days with another lender, and if so, determining the dates on which those contracts were entered;
- c. asking the borrower if they currently have any high-cost consumer credit contracts with another lender, or have repaid any high-cost consumer credit contracts with another lender over the past 15 days;
- d. collecting information from the borrower that would enable the lender to determine whether the borrower's existing loans are high cost loans – eg copies of the contracts, or if these are unavailable, standard contracts or loan disclosures that may give a range of the interest rates of the relevant loans;
- e. verifying the information provided by the borrower and checking for any contracts that may have been omitted through:
  - i bank statements (looking for deposits from other lenders, or outgoings to other lenders);
  - ii reviewing credit reports for enquiries or defaults; and
  - iii going back to the borrower to clarify any discrepancies.

## Pawnbroking

### Commentary

*Pawnbroking transactions are subject to and must comply with both the Act and the Secondhand Dealers and Pawnbrokers Act 2004 (SDPA).*

*For a pawnbroking transaction, a borrower can make payments under the agreement in the form of either:*

- *monetary payment of the redemption price (as defined under the SDPA); or*
- *the sale of the pledged item by the lender on behalf of the borrower.*

**5.25.** In assessing whether it is likely the borrower can make payments without substantial hardship, the lender can inquire into and assess:

- a. whether the borrower can pay the redemption price through monetary payments without substantial hardship by making inquiries in accordance with regulations 4AF and 4AJ–4AO; or
- b. whether the borrower can make the payments through a sale of the pledged item without substantial hardship, in accordance with regulation 4AI. Sale of the pledged item may cause substantial hardship to the borrower if the item is essential to the borrower.

**5.26.** If the lender makes an assessment under **5.21.b**, the lender should be satisfied that an item is not essential, taking into account the borrower’s circumstances.

### Commentary

*Regulations 4AJ(3)(a)(i) and 4AM(2)(a)(i) require verification (or allow for verification) of some information provided by the borrower about their income and expenses.*

*Borrowers may provide other information for the purposes of the lender’s inquiries into whether the agreement is affordable.*



# 6. Inquiries into and assessment of substantial hardship (guarantors)

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## Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

## Lender responsibility

*A lender must, in relation to a relevant guarantee that is taken by a lender, make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship (see s 9C(4)(a) of the Act).*

## Guidance

### General

- 6.1.** To meet this lender responsibility, a lender should be satisfied that it is likely that the guarantor will be able comply with the guarantee without undue difficulty, as well as:
- a. meet necessities (such as accommodation, food, utilities, transport, required medical expenses);
  - b. meet other financial commitments (such as repayments on existing debts);
  - c. without having to realise security or assets, other than security or assets that:
    - i the guarantor is willing to dispose of, or realise the value of; and
    - ii disposing of the assets or realising their value would not cause the guarantor to suffer substantial hardship.
- 6.2.** The assessment should take into account the extent of the guarantor's liability under the guarantee, for instance whether the guarantor may be called upon to make full payment of all outstanding amounts owed by the borrower, or whether the guarantor's liability or the lender's right of recourse is limited, or where the guarantee is taken in conjunction with a security interest.

- 6.3. Where the interest rate under the agreement can vary, a lender should take account of the risk that the interest rate may rise.

## Inquiries

- 6.4. To meet this lender responsibility, a lender should make reasonable inquiries into how the guarantor will comply with the guarantee, or make any payments that could be required under the guarantee. Guarantors may rely on income to comply with the guarantee, or could rely on disposing of or realising the value of assets.
- 6.5. If the guarantor will rely, wholly or in part, on income to comply with the guarantee, a lender should also make reasonable inquiries into a guarantor's income, expenses and the likelihood of making payments.
- 6.6. A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to assess whether it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship.

## Scope of inquiries

- 6.7. A lender's inquiries into the guarantor's **income** may include inquiries into:
- a. the guarantor's current income level
  - b. the sources and stability of the guarantor's income, including likely changes
  - c. the type of credit agreement (for instance, bridging finance) where relevant
- 6.8. A lender's inquiries into the guarantor's **expenses** may include inquiries into:
- d. the guarantor's expenses to meet necessities (such as accommodation, food, utilities, transport, required medical expenses)
  - e. the guarantor's other financial commitments, including repayments on existing debts
  - f. other regular expenditure that the guarantor intends to make (such as tithing, pay TV subscriptions)
  - g. likely changes in the guarantor's expenditure.
- 6.9. A lender's inquiries into the guarantor's **likelihood of making payment** may include inquiries into:
- a. the guarantor's credit history, which may be obtained through the results of a credit check
  - b. other information that the lender considers reliable to assess the likelihood of making payment.

**6.10.** Depending on the circumstances, it may be reasonable for the lender to make inquiries into other matters to be satisfied that it is likely that the guarantor will make payments without suffering substantial hardship.

#### Method of inquiries

**6.11.** In making the reasonable inquiries, a lender may obtain information:

- a. directly from the guarantor (including any supporting documents);
- c. that it holds about the guarantor (who may be an existing customer of the lender), if satisfied that the information is reliable and current;
- d. about the guarantor from reliable third parties such as government departments, credit reference agencies or valuers; or
- e. which is generated based on statistical information relating to an appropriate class of guarantors, provided that:
  - i the statistical information is reliable and recent; and
  - ii use of this method is reasonable in the circumstances (for instance, if a component of household expenditure is estimated using statistical information, there is a low risk that the estimate will be materially lower than the particular guarantor's expenditure).

#### Extent of inquiries

**6.12.** The scope and method of inquiries (as referred to at 6.7 to 6.11) that are reasonable for a lender to make to be satisfied of the matters set out in 6.2 may differ depending on the circumstances. A lender should make more extensive inquiries where:

**6.13.** There is a greater risk that the guarantor will not be able to comply with the guarantee. This includes where:

- a. the size of the guarantor's potential liability is large relative to the guarantor's ability to repay;
- b. the guarantor is a vulnerable guarantor; or
- c. the credit agreement is a high-cost credit agreement; or
- d. The consequences of the guarantor not being able to comply with the guarantee may be serious. This includes where the potential consequences include the loss of a significant asset of the guarantor.

**6.14.** A lender could undertake less extensive inquiries where the consequences of the guarantor not being able to comply with the guarantee are limited.

## Verification

- 6.15.** Lenders may rely on the information provided to them by the guarantor unless the lender has reasonable grounds to believe that the information is not reliable.
- 6.16.** Where the lender has reasonable grounds to believe the information is not reliable, the lender should take reasonable steps to verify the information provided by the guarantor.
- 6.17.** A lender may ask for or receive information from brokers or other intermediaries acting on behalf of the borrower or guarantor. Where that is the case:
- a. A lender may rely on information provided to it by a broker or intermediary as though it had been provided by the guarantor.
  - b. A lender should require financial advisers to implement and maintain appropriate policies and procedures to collect information from the guarantor and verify it, and for the broker to train their staff on the Code and the lender responsibility principles.

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# 7. Assisting borrowers to make an informed decision

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## Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

## Lender responsibilities

*A lender must, in relation to an agreement with a borrower, assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that:*

- *any advertising complies with advertising standards set out in the regulations and is not, or is not likely to be, misleading, deceptive, or confusing to borrowers;*
- *the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner;*
- *any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing*
- *reasonable steps are taken to offer to the borrower information about the agreement in another language (language A) if:*
  - *advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and*
  - *the steps are necessary to ensure that the borrower can reach an informed decision (for example, if the borrower may not have a good understanding of the language in which the lender is otherwise providing information to the borrower under this Act) (see s 9C(3)(b) of the Act).*

## Commentary

*The lender responsibility to assist informed decisions is separate from, and additional to, the lender's obligations under the Act to:*

- *publish standard form credit agreements and costs of borrowing information; and*

- *make initial disclosure of key information set out in Schedule 1 of the Act and of all terms of the contract.*

## Guidance

### Advertising

**7.1.** See the earlier Guidance in section 3.

### Communicating key features

**7.2.** To assist a borrower to make an informed decision as to whether to enter into an agreement and to be reasonably aware of the full implications of entering that agreement, a lender should inform the borrower of the key features of the agreement. The lender should clearly highlight those features in a way that draws the borrower's attention to that information. This information should be provided at a time that assists the borrower to make an informed decision. The key features should include:

- a. the amount of credit or finance under the agreement and the term of the agreement, if any;
- b. the amount of any establishment fees and any other mandatory fees the borrower must pay when entering the agreement, and information on whether other interest or fees, including periodical or event-based fees, may be charged over the loan term;
- c. any non-avoidable fees or charges for additional goods or services provided under the agreement;
- d. any fees or charges to be financed under the agreement paid for separately (for example, premiums for insurance related to the credit, extended warranties or repayment waivers);
- e. interest rates expressed as annual rates (in terms of a percentage), and the total amount of interest payable, if ascertainable (but the lender may choose not to include the total amount of interest if the agreement would not, on the assumptions prescribed by regulations under the Act, be paid out within 7 years of the date on which credit is first provided under the agreement);
- f. where relevant, repayments on a periodic basis and the total amount of payments, if ascertainable (but the lender may choose not to include the total amount of interest if the agreement would not, on the assumptions prescribed by regulations under the Act, be paid out within 7 years of the date on which credit is first provided under the agreement);

- g. the cancellation period under section 27 of the Act and any other cancellation rights that the lender may offer;
- h. key risks and characteristics of the specific product. For instance, where applicable:
- i that secured property is at risk if the borrower defaults or does not make the repayments, including in the context of a pawnbroking transaction;
  - ii the fact that the interest rate is variable or that the lender has the power to unilaterally change the interest rate;
  - iii that a prepayment fee may be payable under a fixed-rate agreement if the borrower repays some or all of the credit early;
  - iv the rate of any default interest and the amount of any default fee;
  - v for reverse equity mortgages:
    - how the reverse equity mortgage agreement works;
    - how the amount of any loan being considered, changes in the value of the home, and life expectancy can affect the borrower's net equity in the home (including through a home equity release calculator);
    - whether the borrower has a right to occupy the home for the rest of their life;
    - whether the borrower's liability under the agreement is or is not limited to the net realisable sale price for the home; and
    - the borrower's obligations to maintain the home;
  - vi for buy-back transactions:
    - how the buy-back transaction works;
    - whether the borrower has a right to occupy the home for the rest of their life;
    - the amount and frequency of rental payments;
    - the terms of the borrower's right to repurchase, including the purchase price or how and when it will be calculated; and
    - the borrower's obligations to maintain the home.

**7.3.** For borrowers who are refinancing an existing agreement, lenders may instead of highlighting the key features listed in 7.2, highlight to the borrower any differences in the key features between the refinancing agreement and the existing agreement.

- 7.4.** A lender should respond promptly to a borrower's requests for further information about the features of the agreement. Where a lender allows borrowers to arrange credit online or remotely, a lender should ensure borrowers are provided with a simple, clear and timely way to seek further information from the lender.

## Example

*Lender B allows credit to be arranged via its website. Lender B provides a free call number, local rate telephone number or live web chat system for borrowers who wish to seek further explanation.*

## Legal advice

- 7.5.** A lender should generally recommend that borrowers seek independent legal advice when the lender is aware that:
- a. more than one party will be the borrower under a credit agreement, but that only one of those parties will receive the direct benefit of all money lent; or
  - b. any borrower may be under undue influence from any other party, including another borrower or any third party who will receive the direct benefit of all money lent.
- 7.6.** The lender should recommend that the independent legal advice be sought from a lawyer who is not also advising another borrower, guarantor or a third party who may be exerting undue influence over the borrower.
- 7.7.** The lender should, where reasonably practicable, make these recommendations to the relevant borrower without the presence of other borrowers or guarantors, or any third parties who the lender has reasonable grounds to believe may be exerting undue influence over the borrower.
- 7.8.** A lender should require borrowers to seek independent legal advice when entering into reverse equity mortgages or buy-back transactions. The lender should require that the independent legal advice be sought from a lawyer who is not also advising the lender in the proposed transaction.

### Commentary

*Lenders providing reverse mortgages and buy-back transactions may also refer to the Ministry of Social Development's Home Equity Release Schemes Code of Standards.*

## Guidance

### Means and level of communications



- 7.9.** A lender should highlight the key features identified at 7.2 to the borrower in a way that draws the information to the attention of the borrower and assists an informed decision, regardless of the channel through which credit is arranged.

#### Example

*Borrower B is seeking credit from Lender C at Lender C's premises. One way that Lender C can draw the information about key features to the attention of Borrower B is by providing Borrower B with a credit agreement and explaining the key features of the agreement while at the same time highlighting the parts of the agreement relating to those key features. A lender should be satisfied that the level of assistance provided when informing the borrower of the key features and the extent of any additional assistance provided (referred to below) will be sufficient to assist the borrower to reach an informed decision and to be reasonably aware of the full implications of entering into the agreement.*

- 7.10.** The level of explanation and assistance that are reasonable for a lender to provide when informing the borrower of the key features identified at 7.2 may differ depending on the circumstances. Greater or further assistance should be provided when informing the borrower of the key features where:

- a. there is a greater risk that a borrower may not be aware of the implications of entering into the agreement. This includes where:
  - i the agreement is complex or uncommon, such as a buy-back transaction or reverse equity mortgage;
  - ii the agreement is a high-cost credit agreement;
  - iii the borrower is a vulnerable borrower;
  - iv the borrower would be a new customer of the lender; or
- b. there is a greater risk that the borrower will not be able to comply with the agreement. This includes where the size of the loan is large relative to the borrower's ability to repay; or
- c. the consequences of the borrower not being able to comply with the agreement may be serious. This includes where:
  - i the potential consequences include the loss of a significant asset; or
  - ii the default interest plus default fees are high relative to the amount of the loan or the credit limit.

- 7.11.** A lender may provide a lower level of assistance when informing the borrower of the key features where there is a low risk that a borrower may not be aware of the implications of entering into the agreement. This includes where:

- a. the credit agreement is a simple credit agreement that is widely understood, such as an overdraft; or

- b. the borrower will receive legal advice before entering into the agreement; or
  - c. the borrower is a well-informed user of credit.
- 7.12.** A lender should allow borrowers a sufficient opportunity to fully consider an offer of credit, including by:
- a. giving the borrower the opportunity to take information about the key features off-site where the credit is arranged in person;
  - b. giving the borrower the opportunity to seek the advice of others; and
  - c. making clear that the offer of credit is available for a reasonable period specified by the lender (subject to the closing dates of special promotional offers that are open for a reasonable period of time and changes to market pricing).
- 7.13.** Where a lender reasonably suspects that the borrower does not have a good understanding of the language the lender is using to communicate with the borrower, a lender should provide, or refer the borrower to alternative mechanisms for receiving the relevant information. This could involve the lender providing access to, or referring the borrower to, an interpreter or member of staff who is fluent in the relevant language or providing access to the information in that particular language. A lender should not rely on children under 18 or those with a potential conflict of interest to act as interpreters; for instance, where a parent is obtaining a loan for an adult child's benefit, the child should not be an interpreter. (See additional guidance below where a lender advertises in another language.)
- 7.14.** Where the lender has explained the key features of the agreement in detail but the lender is aware that the borrower has not understood the key features of the agreement as explained by the lender, a lender should take further steps to assist the borrower's understanding. For instance, the lender could provide further assistance by recommending that the borrower takes away a copy of the contract and other information provided and seeks legal advice or advice from organisations that provide information about consumer rights to obtain a better understanding of the implications of the agreement.

#### Online credit applications

- 7.15.** Where a lender provides an online application process, a lender should take all reasonable steps to ensure that the borrower understands the key features before entering into the loan agreement. This should include providing the key information in 7.2 in an online format for the customer to understand. In an online format, it may be more difficult to gauge whether the borrower has understood the terms of the contract, compared to in person. A lender can also make available on their website a standard contract for different types of lending with the key features highlighted.
- 7.16.** For online transactions, lenders should assess information (where the borrower's lack of understanding could be apparent to the lender based on their online answers on the electronic

application form), recommending that the borrower contact the lender in another way before they make a decision to enter into a credit agreement.

## Example

*Borrower B is seeking credit from Lender C through Lender C's website. One way that Lender C can draw the information about key features to the attention of Borrower B is by ensuring that the borrower progresses through (and is unable to skip) screens that highlight information about the key features, giving the borrower the opportunity to see and read the explanations provided.*

## Further steps for lenders

**7.17.** Nothing in this section of the Code is intended to suggest that lenders should routinely ask questions specifically for the purpose of determining whether a borrower is vulnerable, may not have a good understanding of the lender's usual language, or may not have understood the information provided, in circumstances where lenders otherwise have no reason to suspect this to be the case.

## Advertising in another language

### Commentary

*A lender must take reasonable steps to offer the borrower information about the agreement in another language if the lender is advertising in that language, and if this is necessary to ensure the borrower can reach an informed decision.*

*This obligation applies only if a lender distributed advertising that was wholly or significantly in another language to the public or to a section of the public in the previous 6 months. This obligation generally only applies to systematic advertising. For instance, a newspaper advertisement in another language would constitute an advertisement to the public or a section of the public, but an ad hoc discussion with an individual borrower by an employee of a lender in another language would not.*

*This guidance only applies to credit advertising and does not cover general brand advertising or advertising relating to non-credit products.*

- 7.18.** This guidance only applies to credit advertising and does not cover general brand advertising or advertising relating to non-credit products.
- 7.19.** Where the lender has advertised in a language in the previous 6 months, a lender must take reasonable steps to offer information about the loan in the advertising language for the borrower to make an informed decision about entering the agreement.
- 7.20.** Lenders should establish processes that give borrowers opportunities to opt in to receive information in the advertising language at relevant points before an agreement is entered into. Lenders can provide these opt-in opportunities in different ways, for example:

- a. lenders can include a question in an application form about the borrower’s primary language and whether the borrower would like to receive information in this language;
  - b. lenders can advise borrowers that information is available in other languages when dealing with the borrower in person.
- 7.21.** Where a lender reasonably suspects that the borrower does not have a good understanding of the lender’s usual language and the lender knows that the borrower speaks the advertising language, lenders should offer to provide information about the key features of the agreement (as per 7.2) in the advertising language. Some of the ways that lenders could offer this information include:
- a. the lender may offer translated material in the advertising language that provides the borrower with the key features of the agreement; or
  - b. the lender may refer the borrower to an interpreter or a member of staff who is fluent in the advertising language or to translation services (at the lender’s cost).

## Plain language agreement

- 7.22.** To comply with the lender responsibility to ensure that the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner, a lender should:
- a. set out agreements using a layout and font size that can be easily read;
  - b. set out the terms in a logical order that is easy for borrowers to follow;
  - c. highlight important information; and
  - d. explain complex information in plain language and include a clear explanation of any necessary jargon.
- 7.23.** “Concise” refers to the presentation of specific information rather than the overall length of the communication or document. A longer but clearly written document, may take less time to read and understand than a shorter, but poorly written one.
- 7.24.** “Intelligible” involves an overall assessment of whether the terms are understandable and comprehensible to borrowers in the target market.

## Example

*Lender A is putting together terms for a new credit product. Potential steps that the lender could take to ensure that the agreement is in plain language in a clear, concise, and intelligible manner include:*

- *using a communications or plain language adviser to help prepare the terms of their new credit product;*
- *consulting a focus group.*

The focus group could be made up of a representative group of consumers (including individuals with no experience in credit agreements) and a financial mentor. The lender could ask the focus group to review whether the terms are clear, concise and intelligible, and take into account the focus group's feedback to refine the agreement.

## Guidance

### Manner of presenting information

- 7.25.** To ensure that any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should apply the following Guidance to all information provided to the borrower in relation to the agreement before it is entered into, regardless of the form and time at which information is given.
- 7.26.** A lender should comply with the following practices to ensure that information provided to the borrower is not misleading, deceptive or confusing:
- a. make sure important information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with the importance of it;
  - b. use technical language and statistics only where they are relevant and in a way that can be readily understood by consumers without specialist knowledge;
  - c. where referring to fees or costs, avoid giving an unrealistic impression of the overall levels of fees and costs;
  - d. where referring to an interest rate or an amount of interest:
    - i convey with equal importance as any other interest rate or amount of interest an annual percentage interest rate;
    - ii advise if that rate is fixed, variable or capped; and
    - iii advise if fees will apply, and, if ascertainable, provide the amount of any establishment fees and any other mandatory fees the borrower must pay when entering into the agreement;
  - e. where referring to the amount of regular repayments for a particular term loan, include an indication of the total costs of borrowing, which could be through an indication of:
    - i the total amount payable under the agreement, if ascertainable (but the lender may choose not to include the total amount of interest, if on the assumptions prescribed in the regulations under the Act, the agreement will not be paid out within 7 years of the date on which credit is first provided under the agreement);  
or
    - ii how the total amount payable under the agreement will be calculated;

- f. when referring to the amount of regular payments, the amount of any lump sum payments and when they are required to be made;
- g. when providing details of interest rates or fees that apply for an initial promotional period, state the period for which the discount applies and:
  - i. where ascertainable, what the interest rate or fees will change to after that initial promotional period; or
  - ii. where the subsequent interest rate is not ascertainable, how the subsequent interest rate will be calculated.

## Guidance

### Processes

**7.27.** To comply with the above lender responsibility principle and lender responsibilities, a lender should have policies and procedures in place to ensure that any information it gives a borrower complies with legal obligations and is not misleading, deceptive, or confusing. Such policies and procedures may also include complying with relevant industry codes.

**7.28.** A lender's policies and procedures should include:

- a. requiring relevant staff and agents who have customer contact on the lender's behalf to comply with the Act, Regulations, Fair Trading Act 1986 and the Guidance in this Code and the lender being satisfied that they understand how to do so;
- b. being satisfied that relevant staff and agents who have customer contact on the lender's behalf are familiar with the features of credit products which they deal in, as well as current promotions and representations; and
- c. requiring that all online, print and other promotional materials are subject to an approval process, including being checked by a staff member with necessary product knowledge to ensure that the description is accurate.

### Commentary

#### Extended warranties

*Section 9B(4) of the Act provides that "if an agreement involves a repayment waiver or an extended warranty [provided by the lender], the repayment waiver or extended warranty is to be treated as forming part of the [credit] agreement for the purposes of this Part [relating to the lender responsibilities]".*

*Guidance in relation to assisting informed decisions for extended warranties is set out below.  
Guidance in relation to assisting informed decisions for repayment waivers is set out in section 9 of this Code, together with Guidance relating to credit-related insurance.*

## Guidance

### Extended warranties

- 7.29.** The Fair Trading Act 1986 includes provisions that assist consumer understanding of extended warranties, and a lender should refer to Commerce Commission guidance on those obligations when providing extended warranties.

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# 8. Assisting guarantors to make an informed decision

## Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

## Lender responsibilities

*A lender must, in relation to a relevant guarantee that is taken by a lender, assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that:*

- *the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner;*
- *any information provided by the lender to the guarantor is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and*
- *reasonable steps are taken to provide the guarantor with information about the guarantee in another language (language A) if:*
  - *advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and*
  - *the steps are necessary to ensure that the guarantor can reach an informed decision (for example, if the guarantor may not have a good understanding of the language in which the lender is otherwise providing information to the guarantor under this Act) (see s 9C(4)(b) of the Act).*

## Guidance

### Communication of information

- 8.1.** To assist a guarantor to make an informed decision as to whether or not to give a guarantee, and to be reasonably aware of the full implications of entering the agreement, a lender should inform the guarantor of the key features of the guarantee. The lender should clearly highlight those features in a way that draws the guarantor's attention to that information. This information should be given at a time that assists the guarantor to make an informed decision. The key features that should be highlighted include:



- a. that by giving a guarantee, the guarantor will become liable as well as, or instead of, the borrower;
  - b. that the guarantor will be liable for the full amount of the borrower's liabilities under the credit agreement and other costs unless the lender has agreed to limit the guarantor's liability;
  - c. that the guarantor may ask that their liability under the guarantee be limited (but a lender may not always agree to that);
  - d. whether or not the guarantor will be informed of repayment difficulties with the loan, and if so, the point at which they will be informed; and
  - e. the key features relating to the credit agreement as set out at 7.2, to the extent that they are relevant to the guarantor's liability.
- 8.2.** A lender should respond promptly to guarantors' requests for further information about the features of the agreement.
- 8.3.** A lender should not provide information to the guarantor indirectly through the borrower.
- 8.4.** A lender may, instead of providing the information set out at 8.1 above directly to the guarantor, rely on the guarantor's lawyer's explanation of that information if the lender is reasonably satisfied that the guarantor's lawyer has done so (for instance, because the lawyer has confirmed that they have done so which could be through a Solicitor's Certificate confirming that the lawyer has explained the information requested).
- 8.5.** A lender should generally recommend that guarantors seek legal advice or advice from organisations that provide information about consumer rights before giving the guarantee, and allow them sufficient time to do so before they provide a guarantee.
- 8.6.** A lender should generally require a guarantor to seek legal advice where the guarantor's own home will be available as security under a mortgage to the lender for lending to a borrower, except where the guarantor is effectively the same party as the borrower (such as where the guarantor is a trust, and the borrower(s) are individual(s) who are also trustee(s) of the trust).
- 8.7.** A lender should generally require a guarantor to seek independent legal advice where it has reason to believe that a guarantor may be under undue influence from any other party, including another guarantor, borrower, or any third party who will receive the direct benefit of any money lent. The lender should require that the independent legal advice be sought from a lawyer who is not also advising the borrower, another guarantor or any third party who may be exerting undue influence over the borrower.

## Means and level of communication

- 8.8.** A lender should highlight the key features identified at 8.1 to the guarantor in a way that draws the information to the attention of the guarantor and assists them to reach an informed decision, regardless of the channel through which credit is arranged.

## Example

*One way a lender may highlight some of the above information is by providing a link to a video explaining the implications of giving a guarantee.*

- 8.9.** A lender should be satisfied that the level of assistance provided when informing the guarantor of the features identified at 8.1 and the extent of any additional assistance provided will be sufficient to assist the guarantor to reach an informed decision and to be reasonably aware of the full implications of giving the guarantee.
- 8.10.** The level of explanation and assistance that are reasonable for a lender to provide when informing the guarantee of the key features identified at 8.1 will differ depending on the circumstances. Greater or further assistance should be provided when informing the guarantor of the key features where:
- a. there is a greater risk that a guarantor may not be aware of the implications of entering into the agreement. (This includes where the guarantor is a vulnerable guarantor);
  - b. there is a greater risk that the borrower will not be able to comply with the agreement. (This includes where the size of the guarantor’s potential liability is large relative to the guarantor’s ability to repay); or
  - c. the consequences of the guarantor not being able to comply with the guarantee are serious, such as the loss of a significant asset of the guarantor (such as the guarantor’s home)
- 8.11.** A lender may provide a lower level of assistance when informing the guarantor of the key features where:
- a. there is a low risk that a guarantor may not be aware of the implications of entering into the agreement. This includes where the guarantor:
    - i will receive legal advice before entering into the agreement; or
    - ii is a well-informed user of credit; or
  - b. where the consequences of the guarantor not being able to comply with the guarantee are limited. This includes where the guarantor is a professional or independent trustee whose liability is limited to the assets of a trust.
- 8.12.** A lender should also apply the Guidance set out in paragraphs 7.12–7.17 to guarantors, as if the references in those paragraphs to “borrowers” were references to “guarantors”.
- 8.13.** The lender should ensure that it gives a guarantor the opportunity to ask questions of the lender without the borrower present.

## Advertising in another language

- 8.14.** The lender should refer to 7.19–7.21 for guidance on providing the guarantor the above information in another language when a lender has advertised in that language, as if the references in those paragraphs to “borrowers” were references to “guarantors”.

### Plain language guarantee

- 8.15.** The lender should, in drafting the terms of the guarantee, apply the Guidance on how to provide information in a clear, concise, and intelligible manner set out in 7.22–7.24.

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# 9. Credit-related insurance and repayment waivers

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## Legal obligations

### Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

### Lender responsibilities

*A lender must, in relation to a relevant insurance contract:*

- *make reasonable inquiries, before the contract is entered into so as to be satisfied that it is likely that:*
  - *the insurance provided under the contract will meet the borrower’s requirements and objectives; and*
  - *the borrower will make the payments under the contract without suffering substantial hardship. (see s 9C(5)(a) of the Act).*
- *assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—*
  - *any advertising distributed by the lender is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and*
  - *any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing (see s 9C(5)(b) of the Act).*

### Regulations – minimum required inquiries

#### Commentary

*A lender must comply with the minimum required inquiries prescribed in regulation 4AB. The Regulations require lenders to determine particular aspects of the borrower’s requirements and*

*objectives relating to repayment waivers, extended warranties and credit-related insurance (collectively referred to as 'products') and can be summarised as follows.*

*Prior to making the assessment under s9C(3)(a)(i) or 9C(5)(a)(i), lenders must make reasonable inquiries to enable them to determine the borrowers requirements and objectives. These inquiries must include:*

- *whether the borrower has existing cover or existing rights under the Consumer Guarantees Act 1993, that may protect against some or all of the risks for which the borrower is seeking cover from the lender*
- *whether the borrower's age, employment status or residency status may make them ineligible to claim some or all of the benefits*
- *whether the borrower accepts the costs.*

*These requirements apply in addition to the requirements in regulation 4AA.*

#### **Relevant insurance contracts**

*The above lender responsibilities apply to "relevant insurance contracts", which are credit-related insurance contracts entered into, or to be entered into, by a borrower if:*

- *the borrower has also entered into, or is seeking to enter into, a credit agreement with the lender; and*
- *the insurance is arranged by the lender (see section 9B(1)).*

*The circumstances in which insurance is "arranged" by the lender are set out in section 9B(2) of the Act which is set out in the Appendix of this document, along with the definition of "credit-related insurance" and "consumer credit insurance".*

*Note that a lender can in some circumstances require borrowers to take out credit-related insurance – for instance to protect a secured asset. However, section 69 of the Act provides that a lender must not make any unreasonable requirement as to the terms on which the borrower is to take out or obtain credit-related insurance. Section 69 provides that a requirement is unreasonable if it is not reasonably necessary for the protection of the legitimate interests of the lender or is not reasonably justifiable in light of the risks undertaken by the parties to the arrangement.*

#### **Repayment waivers**

*A repayment waiver is an agreement between a lender and a borrower under which the lender, for an additional consideration, agrees to waive the lender's right to any amount payable under the credit contract in the event of the unemployment of, sickness of, injury to, or the disability or death of the borrower. The way in which a repayment waiver operates is similar to the way in which consumer-credit insurance operates, from the borrower's point of view and should therefore be treated in the same way as consumer-credit insurance. Section 9B(4) of the Act provides for this as it states that "if an agreement involves a repayment waiver [...], the repayment waiver [...] is to be treated as forming part of the [credit] agreement for the purposes of this Part [relating to the lender responsibilities]".*

# Guidance

## Repayment waivers

- 9.1.** The practices and processes set out below in relation to entering into a relevant insurance contract should also be followed by lenders in relation to repayment waivers, in order to comply with the lender responsibilities set out in sections 9C(3)(a) and 9C(3)(b) of the Act and the inquiries prescribed in regulations 4AA and 4AB.

## Borrower's requirements and objectives for insurance contracts

- 9.2.** To meet the lender responsibilities, the lender's inquiries into and assessment of the borrower's requirements and objectives can take into account that there may be a range of products that meet the borrower's requirements and objectives. A relevant insurance contract may have a number of different features, and there may be trade-offs between those features. The lender does not need to assess whether the proposed contract best meets the borrower's requirements and objectives, but should be satisfied that it is likely that the product is within the range of products that will meet the borrower's requirements and objectives.
- 9.3.** In assessing whether it is likely that the borrower's requirements and objectives will be met by the relevant insurance contract, a lender should inquire into and consider the following matters, where relevant:
- a. for the purposes of regulation 4AB(2)(a)(iii):
    - i the risks that the borrower wishes to obtain cover against;
    - ii the length of time for which the borrower wishes to obtain cover. For consumer credit insurance or a repayment waiver this period should usually match any term of the credit agreement unless the borrower has a reason for seeking cover for a different period;
  - b. whether the premium (including interest where the premium is financed under the credit agreement) for any consumer credit insurance policy is excessive when compared to the loan amount or credit limit.
- 9.4.** Where a borrower already has insurance cover, the lender is entitled to (but does not have to) rely on the information provided by the borrower in respect of that cover. The lender is not expected to review the terms of borrowers' existing insurance policies to establish whether they already provide some or all of the protection sought by the borrower. However, the lender should give the borrower an opportunity to check or seek advice on the borrower's existing insurance policies.
- 9.5.** Where the lender will be lending a small amount over a short term, a lender should consider whether the short time period and likely low value of any cover relative to the cost of the

premium means that any consumer credit insurance may be unlikely to meet the borrower's requirements and objectives.

## Example

*Borrower A is currently unemployed. The consumer credit insurance contract that lender B can arrange provides cover primarily for loss of employment. That may be an indication (without other relevant factors, such as that the borrower will shortly be starting a new job) that the consumer credit insurance is unlikely to meet the borrower's requirements and objectives.*

## Example

*Where a loan is for \$500 and to be repaid over 2 weeks, the consumer credit insurance cover may be unlikely to meet the borrower's requirements and objectives as the cover may be too low and too short to be useful to the borrower relative to the cost of the policy given the low likelihood or amount of a claim during the short period of the loan.*

## Guidance

### Substantial hardship

- 9.6.** The lender should apply the guidance in section 5 of this Code in relation to whether it is likely that the borrower will make the payments under the relevant insurance contract without suffering substantial hardship as follows:
- a. If the lender knows that the premium for a relevant insurance contract is to be financed under the credit agreement, the lender should factor in the amount of the premium into the repayments under the credit agreement; or
  - b. If the premium for a relevant insurance contract is not financed in the credit agreement but the lender knows that an insurance contract will be entered into, the lender should include the amount of the premiums (if known) or an estimate of the likely amount of the premiums as part of the borrower's expenses in its assessment of whether the borrower can make repayments under the credit agreement; or
  - c. if:
    - i the premium for a relevant insurance contract is not financed in the credit agreement; and
    - ii in approving credit under the credit agreement, the lender did not know that an insurance contract would be entered into or otherwise was not able to adequately take into account the premiums payable under the relevant insurance contract in an assessment of whether the borrower can make repayments under the credit agreement without substantial hardship

the lender should separately assess whether the borrower can pay the premiums under the relevant insurance contract without substantial hardship.

## Assisting informed decisions

- 9.7.** A lender should not mislead borrowers about whether borrowers have a choice as to whether to enter into a relevant insurance contract and from which providers. In particular:
- a. unless the lender requires the borrower to obtain credit-related insurance (in compliance with section 69 of the Act), a lender should explain that credit-related insurance is optional; and
  - b. unless the lender requires the borrower to obtain credit-related insurance from a particular insurer or insurers (in compliance with section 69 of the Act) or an insurance policy is the only one that effectively relates to the credit agreement, a lender should not represent to the borrower that they cannot obtain insurance from other providers.
- 9.8.** A lender can set certain criteria that the borrower's preferred insurer must meet to be acceptable to the lender, such as a minimum credit rating. However, the lender should ensure that those criteria do not have the effect of materially limiting the borrower's choice of preferred insurer.

## Communicating key features

- 9.9.** A lender should apply the Guidance set out at 9.11–9.17 to all relevant insurance contracts, unless the relevant insurance contract is one that is financed by the lender but which is entered into independently by the borrower with an insurer that does not have a relationship with the lender, and without the lender's facilitation.
- 9.10.** To assist a borrower to make an informed decision as to whether to enter into a contract and to be reasonably aware of the full implications of entering that contract or require the insurer to do so. A lender (or insurer) should inform the borrower of the key features of the contract. The lender should clearly highlight those features in a way that draws the borrower's attention to that information, or by requiring the insurer to do so. This information should be given at a time that assists the borrower to make an informed decision. Those key features should include:
- a. the amount of the premium, or how the premium will be calculated;
  - b. where the premium is funded by the loan, the total amount of interest payable, or how the interest will be calculated
  - c. if there is the option for the borrower to pay the premiums in instalments, rather than as a lump sum, the lenders should advise the borrower of this option (because it will mean the borrower will not pay interest on the lump sum premium);



- d. the cover provided (including the risks insured against and the amount of the cover) and the excess(es) that apply;
  - e. that exclusions apply (if applicable), together with clear information about where to find the exclusions in the relevant insurance policy;
  - f. the duration of the cover, if the period of cover is limited; and
  - g. any cooling-off period provided under the terms of the policy during which the borrower can cancel the policy.
- 9.11.** A lender should respond promptly to borrowers' requests for further information about the key features of the contract. Where a lender allows borrowers to arrange credit and the relevant insurance contract online or remotely, the lender should ensure borrowers are provided with a simple, clear and timely way to seek further information from the lender.
- 9.12.** A lender should highlight the key features identified at 9.10 to the borrower in a way that draws the information to the attention of the borrower, regardless of the channel through which insurance is arranged.
- 9.13.** A lender should be satisfied that the level of assistance provided when informing the borrower of the key features will be sufficient to assist the borrower to reach an informed decision and to be reasonably aware of the full implications of entering into the contract.
- 9.14.** The level of explanation and assistance that are reasonable for a lender to provide (including through an insurer) when informing the borrower of the key features of the contract may differ depending on the circumstances. Greater or further assistance should be provided when informing the borrower of the key features where there is a greater risk that the borrower may not be aware of the implications of entering into the contract. This includes where
- a. the borrower is a vulnerable borrower; or
  - b. the borrower would be a new customer of the lender.
- 9.15.** A lender may provide a lower level of assistance when informing the borrower of the key features where there is a low risk that a borrower may not be aware of the implications of entering into the contract. This includes where:
- a. the borrower is a person (other than a vulnerable borrower) who lenders can reasonably expect to have a good pre-existing understanding of insurance contracts of that type, which may be due to their previous experience with insurance contracts of that type; or
  - b. for simple insurance over secured property or leased goods.
- 9.16.** A lender should also follow the guidance at 7.11–7.14 in relation to:
- a. allowing borrowers a sufficient opportunity to consider the terms of the relevant insurance contract; and

- b. dealing with borrowers who do not appear to have a good understanding of English or who do not appear to have understood the explanations provided.

## Advertising

**9.17.** A lender should ensure that advertising or marketing material promoting credit-related insurance that is developed and distributed by the lender is —

- a. developed in conjunction with the insurer;
- b. based on guidance from the insurer; or
- c. checked by the insurer to ensure that the description of the insurance product is accurate.

**9.18.** If the lender uses advertising material developed and supplied to the lender by the insurer, the lender should require that the advertising material complies with all legal obligations. The lender should also apply the general advertising Guidance at section 3, where relevant.

# 10. Fees

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## Legal obligations

### Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

### Lender responsibility

*A lender must, in relation to an agreement, meet all the lender's legal obligations to the borrower, including under this Act... which include obligations in relation to... credit fees (see s 9C(3)(f) of the Act).*

### Commentary

*The lender responsibilities require lenders to meet all legal obligations to the borrower and section 9F(1)(b)(vii) of the Act provides that the Code may set out the processes, practices, or procedures that a lender should follow to ensure that fees are not unreasonable in terms of section 41, 80 or 82.*

*Section 44B of the Act states that evidence of compliance with the provisions of the Code relating to fees is to be treated as evidence that a credit fee or a default fee is not unreasonable. However, as with the rest of this Code, this section does not set out "safe harbours". Compliance with the Code is not deemed to be compliance with the fees provisions of the Act (see section 44B of the Act). Evidence of compliance with the Code will be weighed against other evidence.*

*The processes and practices that a lender should follow to ensure that fees under consumer credit contracts are not unreasonable were the subject of the Supreme Court judgment, *Commerce Commission v Sportzone/MTF* [2016] NZSC 53. Note that while some of the relevant provisions have been amended by the *Credit Contracts and Consumer Finance Amendment Act 2014*, the *Sportzone* case remains relevant as some of the legislative wording in relation to the costs which lenders can recover through fees remains unchanged.*

*The Commerce Commission also provides guidelines on how it interprets the fees provisions and how it intends to enforce them.*

*Establishment fees are defined as fees or charges that relate to the costs incurred by the creditor in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit; but does not include any fee or charge to the extent that it is a charge for an optional service. The relevant legislative provisions (see section 42 of the Act) provide that in determining whether an establishment fee is unreasonable, the Court*

*must have regard to whether the amount of the fee is equal to or less than the creditor's reasonable costs (or average reasonable costs for the class of consumer credit contract) in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit.*

*Prepayment fees are defined as fees that relate only to prepayment in part or in full in respect of a fixed-rate contract and only for that part of the creditor's loss that arises from the prepayment as a result of differences in interest rates. The legislation (see section 43 of the Act) provides that a prepayment fee is unreasonable if, and only if, it exceeds a reasonable estimate of the creditor's loss arising from the part or full repayment. Section 54 of the Act provides that a fee payable for full prepayment must be calculated in accordance with the procedure provided in the regulations or through an appropriate procedure set out in the consumer credit contract. Lenders may also impose a credit fee relating to administrative costs associated with prepayment, which is subject to the credit fees provisions in section 44 of the Act.*

*Credit fees are defined as fees or charges payable by the debtor under a credit contract, or payable by the debtor to, or for the benefit of, the creditor in connection with a credit contract. In determining whether a credit fee (other than an establishment fee and a prepayment fee) is unreasonable, the legislation (see section 44 of the Act) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor. This includes the cost of providing a service to the borrower if the fee relates to the provision of a service. In determining whether the fee reasonably compensates the creditor for that cost or the provision of that service, the Court must have regard to reasonable standards of commercial practice.*

*Default fees are fees or charges payable on a breach of a credit contract by a debtor or on the enforcement of a credit contract by a creditor; but does not include default interest charges. For default fees, the legislation (see section 44A of the Act) provides that the Court must have regard to, in relation to the matter giving rise to the fee, whether the fee reasonably compensates the creditor for any cost incurred by the creditor and for a reasonable estimate of any loss incurred by the creditor as a result of the borrower's acts or omissions. In determining whether the fee reasonably compensates the creditor for that cost or loss, the court must have regard to reasonable standards of commercial practice.*

*For buy-back transactions of land, the legislation (see section 80(1) of the Act) provides that a buy-back transaction must not provide for a buy-back fee or buy-back default fee that is unreasonable.*

## Guidance

### Establishment fees

**10.1.** In setting an establishment fee, a lender should

- a. assess the reasonable costs likely to be incurred by the lender in connection with the application for credit, processing and considering that application, documenting the contract, and advancing the credit. In doing so the lender should:

- b. identify the tasks undertaken in order to establish the credit contract or that class of consumer credit contract and calculate the costs of undertaking each of those tasks;
- c. take into account past experience in relation to the level of reasonable costs incurred for those activities for that class of consumer credit contracts but apply that experience on a forward looking basis to assess the reasonable costs that are likely to be incurred in the future; and
- d. ensure that establishment fees only seek to recover those likely reasonable costs.

## Prepayment fees

**10.2.** In setting a prepayment fee, a lender should either:

- a. use a procedure to calculate a reasonable estimate of loss arising from the prepayment (being losses resulting from differences in interest rates) and ensure that any procedure it uses to calculate prepayment fees only seeks to recover those estimated losses; or
- b. use the formula set out in regulations 8 to 11 of the Credit Contracts and Consumer Finance Regulations 2004 to calculate fees for full prepayments.

## Credit fees

**10.3.** In setting a credit fee (other than an establishment fee or prepayment fee), a lender should:

- a. assess the costs likely to be incurred in relation to the matter giving rise to the fee. The assessment should take into account past experience in relation to the level of costs incurred for those activities for the same or similar credit products but apply that experience on a forward looking basis to assess costs that are likely to be incurred in the future;
- b. ensure that the credit fee only seeks to compensate the lender for those likely costs; and
- c. ensure that any costs that are likely to be recovered through credit fees, and the activities generating those costs, are consistent with reasonable standards of commercial practice. A common commercial practice is not necessarily a reasonable standard of commercial practice.

**10.4.** For those credit fees which are insurance premiums (i.e. insurance premiums where the lender requires the borrower to obtain the insurance cover from a particular insurer or particular insurers) and where the premiums are payable for credit-related insurance provided by the lender, the lender may also recover an amount that reflects the risks insured against.

## Default fees

**10.5.** In setting a default fee, a lender should:

- a. assess the losses likely to be incurred as a result of the borrower's default; and
- b. assess costs likely to be incurred as a result of the borrower's default. The assessment should take into account past experience in relation to the costs incurred as a result of the borrower's default for the same or similar credit products but apply that experience on a forward looking basis to assess costs that are likely to be incurred in the future.

**10.6.** The default fee should only seek to compensate the lender for the above costs and losses.

**10.7.** A lender should ensure that any costs that are likely to be recovered from default fees, and the activities generating those costs, are consistent with reasonable standards of commercial practice. A common commercial practice is not necessarily a reasonable standard of commercial practice.

### Buy-back fees

**10.8.** In setting buy-back fees and buy-back default fees, a lender should follow the Guidance in 10.3–10.7 in relation to credit fees and default fees.

### Fees generally

**10.9.** Lenders should ensure that costs recovered relate to the specific credit contract or that class of credit contract. Costs should be sufficiently close and relevant to the steps in the lending process to which the fee relates that they can reasonably be said to be incurred in relation to those steps.

**10.10.** Lenders may average the relevant costs across a class of credit contracts. When averaging using past experience, a lender should use a representative sample of transactions.

**10.11.** Because fees are set on a forward-looking basis, the Guidance is not intended to suggest that there can or should be exact precision in terms of matching fees to likely costs and losses. However, lenders must undertake an assessment of costs and losses in order to set fees that meet the unreasonable fees provisions of the Act.

### Reviewing fees

#### Commentary

*Section 41A provides that a creditor must—*

*(a) review a credit fee or a default fee if the creditor knows, or ought reasonably to know, that there has been a change that is likely to materially affect the reasonableness of the fee (for example, a change in the creditor's business or costs); and*

*(b) reduce the fee if the result of the review is that the fee is now unreasonable.*

*A lender must make and keep records of how they calculated the fees payable, in accordance with that section.*

**10.12.**A lender should review fees to ensure they are not unreasonable:

- a. prior to or as soon as practicable following any material changes to the lender's costs in providing the product due to:
  - i changes to the product itself;
  - ii changes to the way the lender provides that credit product;
  - iii changes to the lender's business or cost structure; and
- b. as soon as practicable after becoming aware that the lender generated a material profit through fees where it appears that:
  - i the profit was generated as a result of something other than the inevitable imprecision in matching fees with likely costs and losses; and
  - ii the generation of a material profit is likely to continue on an ongoing basis.

# 11. Subsequent dealings

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## Principle

*Every lender must, at all times, exercise the care, diligence, and skill of a responsible lender in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee (see s 9C(2)(a)(iii) of the Act).*

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

## Lender responsibilities

*A lender must, in relation to an agreement with a borrower, assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—*

*(i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and*

*(ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing. (see s 9C(3)(c) of the Act)*

## Guidance

### Information provided

**11.1.** To ensure that any information provided after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should follow the Guidance in 7.25-7.26 in relation to all information provided to borrowers in relation to the agreement, throughout the life of the agreement.

### General communications subsequent to entering into the agreement

**11.2.** A lender should make certain information generally accessible (which could be through its website, at its premises, or by providing it promptly on request) throughout the life of the agreement. That information should include:

- a. what to do if the borrower changes address;
- b. details of the lender's internal complaints processes;



- c. details of the lender's dispute resolution schemes;
- d. information about the availability of relief for unforeseen hardship or repayment difficulties, and application processes for seeking changes to the credit agreement on the grounds of repayment difficulties; and
- e. the potential consequences of default, including, if relevant, repossession.

**11.3.** A lender should be generally available for contact by borrowers. In particular, a lender should:

- a. ensure that borrowers can access up-to-date information about the lender's contact details and the hours during which the lender is generally available for contact (if they differ from normal business hours); and
- b. acknowledge and respond to queries from borrowers within a reasonable time.

**11.4.** A lender should contact the borrower where relevant, including:

- a. to notify the borrower if it has refunded any credit balance resulting from overpayment under a credit agreement or has used that credit balance to repay another amount the borrower owes;
- b. to notify a borrower when they are close to making their final repayment or as soon as practicably possible after the loan has been fully repaid to inform them that they can cancel any automatic payments or direct debits (or when they can do so). (Note that this Guidance does not apply to a credit agreement that is a revolving credit agreement or where the lender has previously agreed that the lender themselves will cancel automatic payments or direct debits);
- c. to provide information in relation to the borrower's rights and potential consequences where the borrower is having repayment difficulties or where the borrower has informed the lender that it is likely that the borrower will soon be in difficulty (see 12.3–12.8); and
- d. to remind a borrower that wishes to prepay an agreement if they are required to pay a prepayment fee or prepayment administration fee.

**11.5.** A lender should follow the Guidance set out at 2.7–2.9 in relation to when and how to contact the borrower.

## Variations

**11.6.** A lender should not increase a borrower's credit limit without the borrower's consent.

Commentary

## Informed decisions

*Lenders must comply with both the variation disclosure requirements of the Act and the lender responsibility to assist informed decisions.*

# Guidance

## Informed decisions (Agreed variations)

- 11.7.** A lender should apply the following Guidance in relation to variations which need to be agreed between the lender and borrower (as opposed to variations made by the lender exercising a power under the agreement).
- 11.8.** To comply with the lender responsibility to assist informed decisions in all subsequent dealings, a lender should, before a borrower makes a decision as to whether or not to enter into a variation to an agreement that is to be agreed between the lender and the borrower:
- a. inform the borrower of the details of the proposed variation;
  - b. unless the variation removes or relaxes one or more of the obligations that the borrower would otherwise have, make it clear that the borrower is not under an obligation to agree to the variation;
  - c. clearly inform the borrower of any changes to the key features referred to at paragraph 7.2;
  - d. where relevant, inform the borrower if they may have more to repay over the term of the agreement, including more interest; and
  - e. respond promptly to any borrower requests for further information.
- 11.9.** A lender should also follow the Guidance set out at 7.9–7.14 and 7.17. In relation to paragraphs 7.9–7.12, the lender may not need to provide the same level of assistance for simple variations that do not affect the key features of the agreement.

## Example

*Borrower A wants to top up their home loan by \$100,000 to help them pay for some renovations. The top up can be done by the lender as a variation to their current home loan. The lender should highlight to Borrower A that the change will increase the amount of each repayment and the total amount the customer needs to repay, including the total interest over the remaining loan term and give the borrower an indicative amount for each of those figures.*

## Example

*Lender A offers to increase an existing borrower's credit card limit from \$5000 to \$10,000. Lender A should highlight to the borrower that accepting the higher limit is voluntary, and that if they use all of the new credit limit they'll have more to repay, which may include more interest if they do not pay off their closing balance each month.*

Plain language variation

**11.10.A** lender should follow the Guidance set out at 7.22–7.24 to ensure that any variation to the agreement is expressed in plain language in a clear, concise and intelligible manner.

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## 12. Default and other problems

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### Legal obligations

*Every lender must, at all times, exercise the care, diligence and skill of a responsible lender in dealings with a borrower or guarantor, and comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2) of the Act).*

### Lender responsibilities

*A lender must, in relation to an agreement with a borrower, treat the borrower, and their property (or property in their possession), reasonably and in an ethical manner, including—*

- *when breaches of the agreement have occurred or may occur or when other problems arise; and*
- *when a debtor under a consumer credit contract suffers unforeseen hardship (see s 9C(3), (d)(i) and (d)(ii) of the Act).*

*A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise (see s 9C(4)(c) of the Act).*

*A lender must assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement (see s 9C(3)(c)).*

#### Commentary

*A lender is entitled to exercise its rights to ensure that the borrower repays the loan, including exercising its right to the security given by the borrower or guarantor.*

*However, the lender must exercise its rights against the borrower or guarantor, or both, reasonably and in an ethical manner.*

*Lenders must comply with responsible lending principles at all times, including where borrowers or guarantors face actual or potential repayment difficulties. Subpart 8 of part 2 of the Act also provides a statutory right for borrowers who are unable reasonably to meet their obligations under a loan to apply to the lender to make certain types of changes to the terms of the loan (the statutory hardship process). This framework is only available to borrowers who qualify. It imposes an obligation on the lender to consider these types of change requests, however the statutory hardship process does not limit the circumstances in which a lender can consider variations generally, nor the types of variations that can be agreed. Where a lender is calling on a guarantor*

*to make payments due under a loan, nothing in the Act prevents a lender agreeing repayment relief if that guarantor experiences repayment difficulties.*

*Some lenders are subject to regulatory or contractual requirements which may limit the range of relief which can be offered.*

*Other statutory obligations may also be relevant when there are repayment difficulties, including requirements of the Act and regulations:*

- *regarding variation disclosure;*
- *regarding disclosure of details of financial mentoring and dispute resolution schemes, in specified circumstances; and*
- *requirements of the Act which provide that a lender cannot take repossession enforcement action while in the process of deciding on an unforeseen hardship application.*

### Identification of repayment difficulties

*Repayment difficulties can be identified in a number of ways. Borrowers may actively inform the lender about current or anticipated repayment difficulties, or a lender could become aware of potential difficulties indirectly: during communications with the borrower, from the borrower's transactional activity, or from the borrower's repayment activity (eg. a pattern of missed or insufficient payments, or frequent requests to change instalment dates).*

*In particular, information which indicates a significant change in circumstances (for example serious illness or injury, recent redundancy, a relationship breakdown, or a death in the family) may be a sign of potential repayment difficulties.*

## Guidance

- 12.1.** A lender should implement policies or procedures which set out how it identifies and manages the loans of borrowers who are having, or anticipate they will have, difficulties repaying a loan.
- 12.2.** Lenders should ensure that staff who communicate with borrowers are trained to recognise key signs of current or potential repayment difficulties, and empowered to either:
  - a. offer to have a conversation with the borrower about whether their repayment arrangements need to be changed, and what the borrower can afford, in cases where this is appropriate, or
  - b. to bring the matter to the attention of staff who can do so.

## Contacting borrowers who have missed payments or exceeded credit limits

### Commentary

*Missed payments, or exceeding the credit limit, may or may not be a sign of repayment difficulties.*

- 12.3.** A lender should implement internal policies or procedures which set out when and how it will contact borrowers who have missed payments or exceeded a credit limit. Policies may have regard to the frequency, duration, and risk of harm, as well as the cost to the borrower if the issues are not addressed.
- 12.4.** A lender should only contact the borrower to the extent necessary to provide the information set out below. Where possible, some options for the borrower to respond to messages from the lender should be free of charge.
- 12.5.** For high-cost credit agreements a lender should ordinarily contact the borrower as soon as possible after one missed payment or credit limit is exceeded, to, at a minimum, notify the borrower of the issues and the risk of escalating debt. If the borrower continues to miss repayments or to exceed the credit limit, the lender should contact the borrower again to discuss or otherwise communicate the other matters set out below.
- 12.6.** All lenders should follow the Guidance set out at 2.7–2.9 about how to contact the borrower (or guarantor) if the borrower misses payments, exceeds the credit limit or otherwise defaults.

### The information to provide

- 12.7.** The information that lenders should provide borrowers who have missed repayments or exceeded the credit limit should be appropriate to the amount, frequency and duration of the issue, and the nature of the credit product.
- 12.8.** The information that lenders provide may include:
- a. notifying the borrower of the missed payment(s);
  - b. informing the borrower of the risk of escalating debt as a result of missed payments, and any additional interest or charges (to the extent these are known at the time);
  - c. if relevant, reminding the borrower that they have a legal right to seek changes to the credit agreement and can discuss options with their lender (i.e. on grounds of unforeseen hardship);
  - d. reminding the borrower of the borrower's right to make a claim under a consumer credit insurance policy or repayment waiver, if applicable;
  - e. reminding the borrower of the borrower's option to obtain legal advice or advice from organisations that provide information about consumer rights (e.g. Citizen's Advice Bureau or Community Legal Centre);

- f. informing the borrower that free and independent building financial capability advice is available<sup>2</sup>;
- g. providing the name and contact details of a building financial capability service funded by the Ministry of Social Development.<sup>3</sup>

### Example

*Borrower H calls their lender (Lender G) to tell them that they have unexpectedly lost their job and are struggling to meet their home loan repayments. Lender G reminds them that they can apply for changes to the repayment amount or credit agreement, what information the lender will need and any time limits for making an application. Lender G's staff member also says the following:*

- *We've found that customers in your situation have benefited from speaking with a financial mentor.*
- *MoneyTalks is an independent and confidential service which is completely free. The financial mentors there can help you with confidential advice, and talk you through your options for getting on top of debts and covering the essentials. I can give you the contact details or else you can look them up online.*

### Communication about actual or anticipated repayment difficulties, missed payments and exceeded credit limits.

**12.9.** Lenders should make easily available to all customers clear information about how to contact the lender if they are experiencing, or expect to experience, repayment difficulties (for example, on lender websites).

**12.10.** When one or more payments have been missed, a credit limit exceeded, or a lender knows that a borrower is experiencing or expects that they might experience, repayment difficulties, the lender should encourage early, open, and honest communication by that borrower in any direct communication with them. This may include, where relevant:

- a. clearly communicating its willingness to engage with the borrower about repayment issues;
- b. encouraging the borrower to engage with the lender to try to find a solution for repayment issues;
- c. assisting the borrower to complete application 'paperwork' required by the lender, where necessary (e.g. if the borrower has difficulty doing so due to low literacy or disability).

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<sup>2</sup> Note that in some circumstances, the information in the paragraphs above is required to be provided under the Act.

## Inquiries if actual or potential repayment difficulties are identified

**12.11.** Where a lender is aware that a borrower is having, or expects to have, repayment difficulties, and in order to meet their obligations (if relevant) under sections 9C(2)(a)(ii), 9C(2)(a)(iii) and 9C(3)(a)(ii) of the Act, a lender should make sufficient inquiries to establish:

- a. whether repayment relief is appropriate;
- b. what repayment relief may be appropriate, given the borrower's circumstances; and
- c. whether the borrower is eligible for the statutory hardship process in subpart 8 of part 2 of the CCCFA.

**12.12.** A lender should only request information from the borrower which is reasonably necessary for the lender to reach a decision on the matter.

**12.13.** The types of inquiries which may be relevant include the following:

- a. asking the borrower:
  - i the reason for the repayment difficulties (e.g. whether there has been a change of circumstances vs a different reason for the difficulties);
  - ii current or expected changes to income or expenses (if known)
  - iii the amount of repayments the borrower may be able to afford;
  - iv how long they may be impacted for (if known);
  - v whether they are able to make a claim under any insurance policy or repayment waiver they may have purchased from a different financial service provider;
  - vi any steps the borrower is taking to address the repayment difficulties; and
  - vii any other information that may be relevant to a lender to support a borrower's request for repayment relief;
- b. checking the borrower's credit, income and repayment history, or other information held about the borrower by the lender.

**12.14.** Where relevant and in cases where the borrower may be eligible to benefit, a lender should check its records, to establish whether the lender has previously provided any credit-related insurance or repayment waiver to the borrower.

**12.15.** For the purposes of section 9C(3)(a), an affordability assessment is required where a variation to the contract (or a replacement contract) is proposed which will extend further credit to the borrower or increase the total credit limit beyond the extent necessary to allow for the deferral or reduction of repayments.

## Types of repayment relief



**12.16.** A lender should make genuine attempts to work with the borrower to limit the rate at which the effects of repayment difficulties escalate.

### Commentary

*Repayment relief will not be appropriate in all cases of repayment difficulty. For example, in cases where the borrower is in hardship and this is expected to be long term (such that the borrower does not expect to be able to continue meeting obligations), then repayment relief may worsen the borrower's position and action to settle the contract may be more appropriate.*

*Where repayment relief is appropriate, different types of relief may be suitable. Below the Code provides guidance on:*

- *granting relief without variation to the credit contract;*
- *variation to the credit contract under the statutory hardship process in subpart 8 of Part 2 of the Act;*
- *other variations to the credit contract.*

### Relief without variation to contract

### Commentary

*Some repayment relief does not involve a variation to the credit contract. For example:*

- *a short-term repayment plan to address outstanding arrears while the borrower continues to meet ongoing obligations;*
- *suspending, reducing, waiving, or cancelling any further default interest or default fees.*

**12.17.** A lender should ensure that if relief is granted without variation to the agreement, the relief preserves the borrower's ability to make an application through the statutory hardship process in subpart 8 of part 2 of the CCCFA, in the event that the borrower has further or ongoing repayment difficulties.

### Example

*On 1 May, Borrower H falls into arrears on one loan repayment and explains to their lender (Lender G) that this is due to additional expenses for emergency dental treatment. Lender G and Borrower H agree repayment relief in the form of a short-term repayment plan where Borrower H makes higher repayments for the next few months, to repay the shortfall over that time. Borrower H subsequently misses one of these higher repayments on 15 July, and makes a statutory hardship application. When considering H's eligibility under s57(1)(a)(iii), Lender G should count the length of time for which the borrower has been in default from 15 July (i.e. the due date of the first missed payment after the arrangement was entered into) rather than from 1 May.*

**12.18.** This kind of arrangement should be recorded in writing by the lender.

### Variation using the statutory hardship process

#### Commentary

*Under subpart 8 of Part 2 of the Act, some borrowers have the right to apply for a change to their credit contract, on the grounds of unforeseen hardship. This is referred to below as the 'statutory hardship process'.*

**12.19.** Where a borrower may be eligible to apply for relief under the statutory hardship process and the type of variation provided for in the statutory hardship process is likely to be suitable, the lender should encourage the borrower to apply.

**12.20.** If a written application has been made under the statutory hardship process, but a solution outside of those provided for in section 56 would be more suitable for the borrower and their particular circumstances, the lender may offer alternative relief (see 'other variation' below).

**12.21.** For the purposes of section 55, a written application:

- a. may be submitted electronically;
- b. may be completed on behalf of the borrower (e.g. by a support person like a family member, or by an authorised agent such as a person with enduring powers of attorney or a financial mentor or by a lender's representative transcribing or taking notes based on a borrower-lender conversation; and
- c. must be authorised by the borrower but does not require the signature of the borrower.

**12.22.** A lender does not need to wait to receive a formal hardship application to start working with a borrower on repayment relief options.

#### Other variation

**12.23.** Where a borrower is willing to work through repayment difficulties to find a way to meet their obligations under the agreement but does not meet the criteria in the Act for the statutory hardship process or where a different change is more suitable, a lender should, where possible, consider an arrangement that enables the borrower to do so. This may include:

- a. relief similar to that provided for in section 56 of the Act;
- b. agreeing to a repayment plan;
- c. accepting reduced payments for a reasonable period of time in order to allow a borrower to recover from the repayment difficulty, where this is fair and reasonable for both the borrower and the lender;
- d. suspending, reducing, waiving, or cancelling any further default interest or default fees;

- e. shifting the borrower's debt to a lower-cost product from the lender's range of consumer credit products, if this better enables the borrower to address their repayment difficulties.

## Matters that a lender should take into account when considering relief

**12.24.** Accommodating a repayment plan or variation is likely to meet the lender's obligation to act with the care, diligence and skill of a responsible lender, if the relief has the following characteristics:

- a. fair and reasonable for both the lender and the borrower in all the circumstances; and
- b. not more extensive than is necessary to enable the borrower to reasonably expect to be able to discharge their obligations while also meeting necessities and other financial commitments.

**12.25.** The following are matters that the lender should take into account when considering what relief is most appropriate for the borrower's circumstances, including whether relief options in section 56 of the statutory hardship process in the CCCFA may be appropriate:

- a. whether the proposed relief will allow the borrower to meet their obligations during the period of the proposed relief and over the remaining life of the credit agreement; and
- b. whether the proposed relief would enable the borrower to meet their obligations during the period of unforeseen hardship or other repayment difficulty, would unnecessarily prolong the period of difficulty, or would be likely to result in the borrower experiencing financial difficulties over the remaining life of the credit agreement;
- c. the nature of the goods or property against which the loan is secured (if relevant) i.e. whether the additional cost paid by the borrower as a result of the repayment plan is reasonable having regard to the value of the goods or property; and
- d. the suggestions, if provided to the lender, of a financial mentor authorised by the borrower to liaise with the lender about the borrower's finances.

## Assisting the borrower to make informed decisions about relief options

**12.26.** Where more than one relief option is available, lenders should provide borrowers with information on the options. This may be by comparing key aspects of the different options, and the overall cost impacts of those options. For example, changing the loan terms to provide for interest only payments for a period of time, or reducing the amount of the borrower's repayment for a period of time may result in less interest accruing and therefore be less costly in the long term than an arrangement that involves deferring loan repayments altogether for a period.

## Informing the borrower regarding effect of relief

**12.27.** When a contract is varied to provide the borrower with relief, the total amount owing on the loan may increase. Lenders should set out the details of the variation in a way that makes it easy for the borrower to understand the effect the relief has on their loan.

**12.28.** Lenders should follow to the greatest extent possible the guidance in Chapters 7 and 11 of the Code.

### Informing the borrower in relation to specific types of relief

**12.29.** Where a borrower is or will be making regular repayments that are less than the amount of interest and fees (including default interest and fees) accruing, the lender should inform the borrower that the borrower is or will be getting further into debt .

**12.30.** In the case of full repayment deferrals, lenders should inform the borrower:

- a. that no payments will be made during the period of the deferral;
- b. the period of time for which payments will be deferred; and
- c. whether the borrower will be charged interest and fees on the loan during the period of the deferral (and therefore whether the loan will increase during the period of the deferral while no payments are being made).

**12.31.** Clearly inform the borrower of any changes to the following key features, to the extent that they can be ascertained at the time:

- a. the total amount of interest; and
- b. the amount of repayments periodically and in total.

### Monitoring

**12.32.** When a variation has been made in response to repayment difficulties, and if there is uncertainty about how the financial situation of the particular borrower may develop, lenders should monitor the contract. In these cases, lenders should regularly communicate with the borrower to understand whether:

- a. they can continue to make payments under the variation at the rate agreed;
- b. their financial situation has changed, in which case the lender should offer to have a conversation about what the borrower can afford and review the variation.

### Suspending direct marketing of further credit

**12.33.** When a lender is aware that a borrower has sought repayment relief due to repayment difficulties, the lender should suspend direct promotion of further credit to that borrower (e.g. loan top ups).

## Suspending active pursuit of recovery

**12.34.** When a lender is aware that a borrower has sought repayment relief, the lender should consider suspending active pursuit of recovery of the debt (i.e. formal demands for payment, or referral or sale of debt to debt collection teams or agencies) until the request for relief is resolved.

**12.35.** The Act provides that a lender cannot take repossession enforcement action while in the process of deciding on a statutory hardship application under subpart 8 of part 2 of the Act. Lenders should take the same approach where assistance outside of the statutory regime is being considered.

## Declining to offer relief

**12.36.** A lender should not decline a statutory hardship application for spurious reasons.

**12.37.** When declining relief (whether under the statutory hardship process or otherwise) the lender should inform the borrower that:

- a. they can make a complaint if they are not satisfied with the lender's decision; and
- b. that they have access to a free external dispute resolution scheme if the lender does not resolve the complaint to their satisfaction.<sup>4</sup>

**12.38.** Where a lender declines an application under the statutory hardship process and intends to issue a repossession notice, prior to issuing the notice, the lender should inform the borrower that they have the option to voluntarily surrender the security property.

## Referring borrowers to financial mentoring or building financial capability services

**12.39.** Lenders should consider establishing referral protocols with free, independent financial mentoring or building financial capability services funded by the Ministry of Social Development, for borrowers experiencing repayment difficulties.

**12.40.** However, lenders cannot rely on financial mentors or other advice services to fulfil lenders' obligations to assist the borrower to make informed decisions.

## Specific Practices relating to other problems, or to repayment difficulties

**12.41.** A lender should not:

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<sup>44</sup> In the case of applications under the statutory hardship process, the lender must also give the borrower a clear summary of their rights under s58 of the Act.

- a. hold multiple direct debit forms signed by the borrower and lodge another form without the borrower's consent if the borrower cancels one;
- b. tell or imply to the borrower that the borrower cannot cancel a direct debit;
- c. continue to receive money from the borrower by direct debit after the lender should have reasonably realised that the payments are being received for a loan that has been fully paid. A lender should put in place systems that identify when such payments are being received on accounts (other than revolving credit agreements) that have been fully paid;
- d. let a borrower exceed their credit limit and charge a fee when this occurs without having given the borrower information (before or after the borrower entered into that credit agreement) that explains that they may be able to exceed the limit;
- e. where a borrower is having repayment difficulties, a lender should not request or suggest that borrowers make loan repayments direct from their benefit or other income unless the lender has first determined that the repayments are at a level which enables the borrower in their current circumstances to reasonably expect to be able to discharge their obligations while also meeting necessities and other financial commitments;
- f. take a new guarantee or vary an existing guarantee after a borrower has defaulted under a credit agreement without informing the guarantor that the guarantee or variation is necessary because of the default;
- g. require that a borrower have made an application for a KiwiSaver hardship withdrawal as a pre-requisite to considering a hardship application;
- h. hold a borrower's or guarantor's passports, credit or debit cards, driver's licences or other critical personal documents. This does not affect the rights of a lender to hold or repossess a credit or debit card issued by that lender to the borrower, in accordance with the lender's terms and conditions; or
- i. contact or communicate with anyone other than the borrower, beyond the minimum extent necessary to reach the borrower.

### Example

*A lender contacts a borrower's employer and identifies the borrower as being in default on a loan. This may be an indication that the lender is not treating the borrower reasonably and in an ethical manner.*

**12.42.** When a borrower is facing repayment difficulties, a lender should take into account the borrower's preferred means of repaying the debt. (In some cases the borrower may prefer that the lender realise the proceeds of selling the secured good before taking further steps, and the lender should do so if that is commercially reasonable, and can be done reasonably promptly).

## Example

*Borrower I with a car loan calls their lender (Lender J) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower I tells Lender J that they have found someone who is willing to buy their car for an amount that is sufficient to repay the car loan in full. Lender J concludes that the assets are not currently at risk and there is only a low risk that the proceeds of sale will not be paid to the lender. Lender J then decides to allow Borrower I to voluntarily sell the car themselves.*

**12.43.** If the lender holds an assignment of wages (i.e. a wage deduction authority under the Wages Protection Act 1983) and intends to forward this to the borrower's employer to obtain repayment of a loan, the lender should inform the borrower of:

- a. the fact that the borrower can withdraw written consent to the deductions at any time; and
- b. the lender's intent to contact the employer, to give the borrower an opportunity to explain the situation to their employer.

## Persistent debt

**12.44.** Some borrowers have revolving credit contracts like overdrafts, credit cards or store accounts, on which the debt does not materially reduce over time. This type of repayment behaviour is not necessarily a problem for the borrower nor is it a reliable indicator of underlying issues. However, in some cases persistent debt of this kind is a symptom of underlying financial difficulties, and results in significant ongoing costs to borrowers who are struggling.

**12.45.** If persistent debt has been identified (either proactively by a lender at their own initiative, or by the borrower raising the issue with the lender) then, depending on the product, the borrower and their circumstances, it may be appropriate for the lender to:

- a. encourage the borrower to contact the lender to discuss options for paying down the debt more quickly, or saving on fees;
- b. offer the borrower one of its lower cost products;
- c. inform the borrower that free and independent building financial capability advice is available; and
- d. offer to provide contact details for a building financial capability service funded by the Ministry of Social Development.

## Enforcement

**12.46.** Where the lender has attempted to work with the borrower to meet their obligations, but is at the point of exercising its enforcement rights:

- a. the lender's decision about which enforcement response to take should be based on what the lender considers to be the most effective way of obtaining repayment of the loan;
- b. the lender may take into account whether a particular enforcement response is necessary to prevent the borrower obtaining more credit (and thus more debt) elsewhere, such as by bankrupting a borrower; and
- c. the lender should not take an enforcement response simply for the purpose of punishing the borrower or guarantor for the borrower's default.

**12.47.**A lender should consider agreeing to an alternative payment arrangement, where the lender calls on a guarantee and the guarantor is:

- a. unable to comply with the guarantor's payment obligations under the guarantee within the time required; but
- b. willing to find a way to comply and the lender is satisfied that an alternative payment arrangement will allow the guarantor to meet their payment obligations within a reasonable period.

**12.48.**To comply with the above lender responsibilities, a lender should:

- a. require that debt collection agents it uses agree to comply with relevant legal obligations, including those under the Act;
- b. require the debt collection agent to ensure that its staff understand and agree to comply with the relevant legal obligations; and
- c. confirm with the debt collection agency that it has processes to ensure that its staff understand and agree to comply with their legal obligations and act in accordance with the terms of the agreement between the lender and borrower.

## Complaints

**12.49.**A lender should be satisfied that relevant staff and agents who have customer contact are capable of recognising when a borrower is making a complaint and understand how complaints are to be referred.

**12.50.**If a borrower has indicated concerns about how the lender is dealing with the borrower, a lender should remind the borrower of the borrower's right to use the lender's internal complaints process, and access the lender's free external dispute resolution scheme. If requested, the lender should provide contact details for its internal dispute resolution team or contact person, and its external dispute resolution scheme.

**12.51.**A lender should have a documented internal complaints process. The process should be straightforward for borrowers and guarantors to follow and use, and information about the process should be accessible to borrowers and guarantors. The complaints process should



describe how complaints can be made, how they will be dealt with, by whom (if by a specific team or person), and the timeframes for dealing with complaints.

**12.52.**The internal complaints process should be consistent with any requirements of the lenders' external dispute resolution scheme, including in relation to complaints registers.

**12.53.**During its internal complaints process, a lender should consider and respond to complaints within a reasonable period of time, having regard to the circumstances including the nature of the complaint. Where the complaint has reached the end of the lender's internal complaints process without full resolution, the lender should (in accordance with the requirements of the lender's external dispute resolution scheme), inform the borrower of the borrower's rights to refer the complaint to the external scheme. The lender should provide the borrower with the contact details for the external scheme.

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# 13. Repossession

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## Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

### Lender responsibilities

*A lender must, in relation to an agreement with a borrower, treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner)(see s 9C(3)(d)(iii) of the Act).*

*A lender must, in relation to an agreement with a borrower, meet all the lender's legal obligations to the borrower, including under this Act... which include obligations in relation to... credit repossession (see s 9C(3)(f)(i) of the Act).*

*A lender must, in relation to a relevant guarantee that is taken by the lender, treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise (see s 9C(4)(c) of the Act).*

## Guidance

### Decisions to repossess

**13.1.** To comply with the above lender responsibilities, a lender should ensure that a decision to repossess is reasonable. In particular:

- a. unless the secured goods are at risk (see below), a lender should consider all other less intrusive means of enforcing the agreement before repossessing those goods; and
- b. despite a. above, a lender should also consider agreeing to repossession where reasonably requested by the borrower.

### Example

*Borrower M who bought their TV on credit calls the lender (Lender N) to tell them they are in financial difficulties and have no way of repaying their loan. Borrower M tells Lender N it should repossess the TV. After discussions about Borrower M's specific circumstances and other options to repay the*

*lending, Lender N discusses what steps it will now take, including repossessing the TV as preferred by Borrower M.*

- 13.2.** Whether a decision by the lender to repossess is reasonable will depend on the circumstances, including the borrower's level of co-operation. For instance, where the borrower remains in contact with the lender and continues to update the lender on their situation, the lender should work with the borrower to consider other less intrusive options. Where the borrower is dishonest, obstructive, or deliberately avoiding the lender, it is likely to be reasonable for the lender to proceed quickly with a repossession.
- 13.3.** A lender's decision to repossess should be taken for the purpose of obtaining repayment of the loan and should not be undertaken simply for the purpose of punishing the borrower where repossession would not be economic given the costs involved.

## Example

*Lender Q considers repossessing items (children's toys and old hand tools) which it has security over for debts owed by Borrower R. Lender Q decides that the likely sale value of the items is less than the likely cost of repossession and sale, and the items are of little or no economic value. In deciding not to repossess in that situation, Lender Q is acting responsibly.*

- 13.4.** A lender should not threaten repossession only for the purpose of intimidating borrowers into repayment where a decision to repossess would not be reasonable (as above). However, in the course of discussing the borrower's default, lenders should inform the borrower that repossession is one of the possible enforcement responses if the default is not remedied and that there may be costs incurred that the borrower will have to meet.

## Commentary

*Under section 83E of the Act, repossession cannot take place unless the borrower is in default under the credit agreement or the goods are "at risk". The Act provides that goods are at risk if the lender believes, on reasonable grounds, that those goods have been, or will be, destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the relevant credit agreement.*

*Under section 83H of the Act, a borrower may voluntarily deliver goods identified in a repossession warning notice and the lender must specify a reasonable place to which the borrower may deliver the goods.*

## Guidance

- 13.5.** To comply with the lender responsibilities, lenders who rely on the "at risk" ground to repossess goods should make and retain a record of the reasonable grounds for their belief that goods were at risk.

**13.6.** The existence of one of following facts is unlikely on its own to provide the lender with reasonable grounds for a belief that goods are at risk:

- a. the borrower is in default under the agreement;
- b. the borrower has changed address without notifying the lender; or
- c. insurance over the goods has lapsed.

**13.7.** In relation to the obligation to specify a reasonable place to which the borrower may voluntarily deliver the goods, a lender should:

- a. specify the place of business that the borrower attended (if any) to obtain the loan as the place to which the borrower may deliver the goods during usual opening hours, unless:
  - i that place is impractical given the nature of the secured good, including due to space constraints;
  - ii the premises is operated by a party that has assigned the credit agreement to another party;
  - iii doing so would pose a safety risk to the lender's staff; or
  - iv some other place is more convenient to both the borrower and the lender; or
- b. in a case where the loan was obtained by the borrower without attending a physical address, specify a place nominated by the lender as the place to which the borrower may deliver the goods during usual opening hours.

## Use of repossession agents

**13.8.** To comply with the above lender responsibilities, a lender should require that the repossession agents and repossession employees who they engage, comply with the credit repossession obligations set out in Part 3A of the Act and the Guidance in this Code in relation to repossession.

**13.9.** Before engaging repossession agents to carry out any repossessions, a lender should:

- a. be satisfied that the repossession agent holds a licence or certificate as required under the Private Security Personnel and Private Investigators Act 2010 (PSPPIA);
- b. be satisfied that any individuals who carry out repossessions on behalf of the repossession agent hold a certificate of approval as a repossession employee as required under the PSPPIA;
- c. require the repossession agent to ensure that its repossession employees understand and agree to comply with their obligations under Part 3A; and

- d. confirm with the repossession agent that it has in place the processes to ensure employee compliance as referred to at 13.9.c.

**13.10.** Before engaging any individual to carry out any repossessions, a lender should:

- a. be satisfied that the individual holds a certificate of approval as a repossession employee as required under the PSPPIA; and
- b. require the repossession employee to understand and agree to comply with their obligations under Part 3A.

## Commentary

### After the repossession warning notice has been issued

*Under section 9C(3)(d)(iii) and Part 3A of the Act:*

- *a lender must, in exercising the right to enter premises, act in accordance with the lender responsibility principles;*
- *the lender responsibilities provide that the lender must take all reasonable steps to ensure that goods and property are not damaged during the repossession process and that repossessed goods are adequately stored and protected; and*
- *the lender must take steps that are reasonably practicable to ensure that the premises are not left obviously open.*

## Guidance

### After the repossession warning notice has been issued

**13.11.** In undertaking repossession, lenders or their agents should:

- a. where practicable, carry out the repossession at a time when the borrower is at the premises to avoid exercising any right to enter by force when the borrower is not present;
- b. when exercising a right to enter premises by force, look over the property to consider a method of entry that would cause the least amount of damage and that would reasonably enable the premises to be left not obviously open;
- c. not use trickery or deception to gain access to a house or other premises, such as by misleading occupants into thinking that the repossession personnel are police officers or bailiffs;
- d. take all reasonable steps to protect the borrower's privacy by only disclosing information about the borrower to other occupants of the premises or other persons where necessary to undertake the repossession. Where the borrower is present, the

lender or its agent should not disclose any information about the credit agreement and repossession to any other occupants that are present. Where the borrower is not present, the lender or its agent may disclose to an occupant the fact that they are exercising a right of repossession against the borrower;

- e. make and keep a record of any damage that occurs to secured goods or other property during the repossession;
- f. allow adequate time to take possession, dismantle, where necessary, and carefully store easily damaged items;
- g. use materials, tools, and containers (as necessary) for taking and carrying items that are fit for the purpose for which they are used;
- h. provide the borrower with a reasonable opportunity to remove other items not covered by the security interest from inside the secured goods, such as children's car seats. Where the borrower is not present, the lender or its agent should:
  - i. where practical, take reasonable steps to remove such items: or
  - ii. alternatively, give the borrower a reasonable opportunity to uplift any such items from the lender following repossession;
- i. check to ensure that property to be repossessed are the goods secured under the agreement; and
- j. use a transportation vehicle or mechanism that is appropriate for the secured goods and minimises the risk of damage or loss to the secured goods through exposure to weather or by leaving them unsecured against theft.

**13.12.**A lender should not threaten, harass or use force against the borrower or other occupants.

## Commentary

### Post repossession and sale

*Under Part 3A of the Act a lender must ensure that every aspect of the sale of repossessed goods is commercially reasonable and take reasonable care to obtain the best price reasonably obtainable for the goods as at the time of sale.*

## Guidance

### Post repossession and sale

**13.13.**Following repossession, a lender should (and should ensure that their agents):

- a. release personal property securities from the Personal Property Securities Register where lenders have repossessed and sold all items subject to the registered security;
- b. take all reasonable steps to store and protect the secured goods so that they are not damaged or subject to loss, including taking steps to protect against the risk of damage by fire, theft, vandalism, or weather exposure;
- c. take reasonable care to obtain the best price reasonably obtainable for the goods as at the time of sale. This can be done through:
  - i an auction or tender that is advertised in a way appropriate to the nature of the goods (for instance, by advertising addressed to persons most likely to have an interest in purchasing such goods or in media that such persons are likely to read); or
  - ii a private sale where the lender is satisfied the price is the best price reasonably obtainable for those goods. One way in which the lender can be satisfied of this is where the price is consistent with an independent valuation by a person with knowledge or experience in the relevant goods or by reference to another independent benchmark.

## Example

*For common consumer items, sale by auction may be a suitable method for obtaining the best price.*

*For unique items of high value, a lender should consider obtaining a valuation or consulting a person with experience in relation to such items to determine an appropriate sale method.*

*Where available, lenders could, refer to price benchmarks; in the case of used vehicles, lenders could refer to prices of second-hand cars listed on TradeMe or in other motor trade publications.*

- d. If a lender repossesses low-value goods that prove unsaleable after a reasonable period of time, it should make the goods available for collection by the borrower.

## Commentary

*Where the net proceeds of the sale of repossessed goods are insufficient to settle the agreement, section 83ZM provides that the amount that the lender may recover is limited to the difference between the amount required to settle the agreement as at the date of the sale and the net proceeds of the sale. After the date of sale (of the first repossessed item, where multiple consumer goods are subject to the credit contract) no interest payments or other payments accrue.*

# 14. Oppression

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## Principle

*Every lender must, at all times, comply with all the lender responsibilities specified in subsections 9C(3), (4) and (5) (see s 9C(2)(b) of the Act).*

## Lender responsibilities

*A lender must, in relation to an agreement with a borrower, ensure, in the case of an agreement to which Part 5 applies, that—*

- *the agreement is not oppressive:*
- *the lender does not exercise a right or power conferred by the agreement in an oppressive manner:*
- *the lender does not induce the borrower to enter into the agreement by oppressive means; (see s 9C(3)(e) of the Act).*

*A lender must ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—*

- *the guarantee is not oppressive:*
- *the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:*
- *the lender does not induce the guarantor to give the guarantee by oppressive means; (see s 9C(4)(d) of the Act).*

*A lender must meet all the lender's legal obligations to the borrower including [...] prohibitions on unfair contract terms under the Fair Trading Act (see s 9C(3)(f) of the Act).*

## Commentary

*The question of whether there has been oppression is highly dependent on the circumstances of the particular credit arrangement. A responsible lender will be alert to the risk that oppression may arise in any credit arrangement by taking into consideration the below Guidance.*

*The Guidance is based on the factors the courts have expressed as generally relevant to the determination of what constitutes oppression and the factors which the Court must have regard to as set out in the Act. The factors in the Act include whether the borrower or guarantor is*



*reasonably able to protect their interests taking into account their particular characteristics (including their age or physical or mental condition). The Guidance does not limit the Court's ability to reopen a credit agreement on grounds of oppression under Part 5 of the Act.*

## Guidance

- 14.1.** To comply with the lender responsibility to ensure that the lender does not induce the borrower to enter into the agreement or a guarantor to give a guarantee, by oppressive means, a lender should:
- a. ensure the lender applies the rest of the Guidance in this Code in relation to assisting borrowers and guarantors to make informed decisions;
  - b. not pressure borrowers or guarantors to enter into an agreement or give a guarantee immediately without allowing them time to consider the information and explanations of the agreement or guarantee provided by the lender;
  - c. not use threats to take enforcement action in response to a borrower's default under one agreement to pressure the borrower to enter into another credit agreement or a guarantor to give a guarantee;
  - d. require lending staff and agents who interact with the borrower or guarantor to consider whether there are any matters which lead them to reasonably believe that the borrower or guarantor may not be reasonably able to protect their own interests (for example, due to their age or physical or mental condition); and
  - e. take particular care when dealing with borrowers that appear not to be reasonably able to protect their own interests, including considering whether the lender should recommend for those borrowers or guarantors to be provided with, or referred for, independent legal advice or other specialist expertise.
- 14.2.** To comply with the lender responsibility to ensure that the terms of the agreement and guarantee are not oppressive, a lender should:
- a. consider, when drafting terms of credit agreements and guarantees,
    - i. how the proposed terms of any credit agreement and guarantee compare to reasonable standards of commercial practice. The mere fact that a particular term is common does not mean it is reasonable. However, consideration of common standards of commercial practice will be helpful; and
    - ii. whether the terms are reasonably necessary to protect the interests of the lender and allow the borrower to be reasonably able to comply with their obligations:
  - b. require lending staff and agents who interact with the borrower or guarantor to:

- i consider whether there are any matters which lead them to reasonably believe that the borrower or guarantor may not be reasonably able to protect their own interests (for example, due to their age or physical or mental condition); and
- ii take particular care when dealing with borrowers or guarantors that appear not to be reasonably able to protect their own interests to avoid the possibility of entering into an unconscionable agreement. This may include recommending that the borrower or guarantor get independent legal advice or other specialist advice.

### Commentary

*When drafting standard form consumer contracts, lenders should consider the Commerce Commission's guidance in relation to unfair contract terms.*

## Guidance

**14.3.** To comply with the lender responsibilities to ensure that the lender does not exercise a power in an oppressive manner, a lender should ensure it applies the rest of the Guidance in this Code in relation to treating the borrower, guarantor and their property reasonably and in an ethical manner.

### Commentary

*A lender that treats the borrower, guarantor and their property reasonably and in an ethical manner in accordance with the Guidance in sections 12 and 13 of this Code, including when breaches of an agreement have occurred in accordance with the lender responsibilities, is unlikely to be exercising a power in an oppressive manner.*

# 15. Glossary

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Lenders under **high-cost credit agreements** should follow Guidance identified as applying to those agreements. The Code treats as high-cost credit agreements those agreements where the annual interest rate (expressed in terms of a percentage) is 50% or greater.

In general, a vulnerable consumer is someone who, due to their personal circumstances, is especially susceptible to detriment, particularly when a firm is not acting with appropriate levels of care.

The Code treats an individual as a **vulnerable borrower** or **vulnerable guarantor** where the lender knows, or the circumstances are such that the lender ought to know, that the individual:

- is unlikely to understand the nature of the transaction or the information provided (for instance because they do not have a good understanding of English or because they do not have basic knowledge about financial matters); or
- appears to be under significant pressure to obtain credit or give a guarantee (for instance, where the credit is needed urgently or for necessities, or where the borrower or guarantor is under undue influence from another party to obtain credit or give a guarantee).

The Code treats as a **well-informed user of credit** those individuals who lenders can reasonably expect to have a good pre-existing understanding of credit agreements or guarantees of that type, which may be due to their previous experience with credit agreements or guarantees of that type, other than:

- an individual who is a vulnerable borrower or guarantor; or
- where the relevant agreement is a high-cost credit agreement.

# 16. Appendix

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## Part A: Key definitions from the Act (As from 1 October 2021)

The definitions of consumer credit insurance, creditor, credit-related insurance, and repayment waiver are set out in section 5(1) of the Act as follows:

**consumer credit insurance** means insurance cover in the event of the insured's disability or death or the insured contracting a sickness, sustaining an injury, or becoming unemployed, if the liability of the insurer is to be determined by reference to the liability of the insured under a credit contract or a consumer lease

**creditor—**

- (a) means a person who provides, or may provide, credit under a credit contract; and
- (b) if the rights of that person are transferred by assignment or by operation of law, includes the person for the time being entitled to those rights; and
- (c) includes a person declared by regulations to be a creditor; but
- (d) does not include a person exempted by regulations from being a creditor

**credit-related insurance** means, in connection with a credit contract or consumer lease,—

- (a) insurance over secured property or leased goods; or
- (b) insurance that provides cover for the shortfall that occurs if secured property or leased goods are totally or substantially destroyed and the insurance proceeds from another insurance contract are insufficient to pay any outstanding obligations of the debtor under the credit contract or the lessee under the consumer lease; or
- (c) consumer credit insurance

**repayment waiver** means an agreement between a creditor or lessor and a debtor or lessee under which the creditor or lessor, for an additional consideration, agrees to waive the creditor's or lessor's right to any amount payable under the credit contract or consumer lease in the event of the unemployment of, sickness of, injury to, or the disability or death of the debtor or lesser

The definitions of **buy-back transaction**, **occupier**, and **transferee** are set out in section 8 of the Act as follows:

### **8 Meaning of buy-back transaction**

- (1) In this Act, unless the context otherwise requires, **buy-back transaction** means a transaction under which—
  - (a) a person (the occupier) transfers, or agrees to transfer, an estate in land to another person (the transferee); and
  - (b) the land is the principal place of residence of the occupier at the time that the occupier enters into the transaction; and
  - (c) the occupier, or a person designated by the occupier, has, after the transfer, a right to occupy the whole or any part of the land; and
  - (d) 1 or more of the following applies:
    - (i) the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part:
    - (ii) there is an understanding between the occupier and the transferee that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part:
    - (iii) there is an understanding between the occupier and any buy-back promoter that the occupier, or a person designated by the occupier, has a right to repurchase the estate in the land in whole or in part; and
  - (e) the occupier is a natural person who enters into the transaction primarily for personal, domestic, household, or investment purposes.
- (2) If, by virtue of any contract or contracts (none of which by itself constitutes a buy-back transaction) or any arrangement, there is a transaction that is in substance or effect a buy-back transaction, the contract, contracts, or arrangement must, for the purposes of this Act, be treated as a buy-back transaction made at the time when the contract, or the last of those contracts, or the arrangement, was made, as the case may be.

The definition of consumer credit contract is set out in section 11 of the Act, which is set out below:

### **11 Meaning of consumer credit contract**

- (1) A credit contract is a consumer credit contract if—
  - (a) the debtor is a natural person; and
  - (b) the credit is to be used, or is intended to be used, wholly or predominantly for personal, domestic, or household purposes; and
  - (c) 1 or more of the following applies:

- (i) interest charges are or may be payable under the contract:
  - (ii) credit fees are or may be payable under the contract:
  - (iii) a security interest is or may be taken under the contract; and
- (d) when the contract is entered into, 1 or more of the following applies:
- (i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business):
  - (ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:
  - (iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:
  - (iv) the contract results from an introduction of one party to another party by a paid adviser or broker.
- (1A) For the purposes of subsection (1)(b), the predominant purpose for which the credit is to be used is
- (a) the purpose for which more than 50% of the credit is intended to be used; or
  - (b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.
- (1B) The reference to intention in subsections (1)(b) and (1A) is a reference to the debtor's intention.
- (1C) An arrangement or a facility is also a consumer credit contract if regulations declare it to be a consumer credit contract.
- (2) This section is subject to sections 14 and 15.

The definition of **relevant insurance contract** is set out in section 9B of the Act as follows:

**relevant insurance contract** means, in relation to a lender, a credit-related insurance contract entered into, or to be entered into, by a borrower if—

- (a) the borrower has also entered into, or is seeking to enter into, an agreement with the lender; and
- (b) the insurance is arranged by the lender.

Section 9B(2) of the Act goes on to explain when insurance is arranged by the lender in the following terms:

- (2) For the purposes of this Part (Part 1A), insurance is arranged by the lender if 1 or more of the following applies:
  - (a) the lender is the insurer:
  - (b) the lender acts as the agent of the insurer in relation to the insurance:
  - (c) the lender receives a commission in relation to the insurance:
  - (d) the lender requires the borrower to obtain the insurance from a particular insurer or particular insurers:
  - (e) the lender has in place any arrangement that has the effect of requiring the borrower to obtain the insurance from a particular insurer or particular insurers:
  - (f) the insurance is financed under the agreement entered into by the borrower and the lender.

## Part B: The lender responsibility principles

### 9C Lender responsibility principles

- (1) Every lender must comply with the lender responsibility principles.
- (2) The lender responsibility principles are that every lender must, at all times,—
  - (a) exercise the care, diligence, and skill of a responsible lender—
    - (i) in any advertisement for providing credit or finance under an agreement; and
    - (ii) before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and
    - (iii) in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee; and
  - (b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).
- (3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—
  - (a) make reasonable inquiries, before entering into the agreement, and before making a material change referred to in subsection (8) so as to be satisfied that it is likely that—
    - (i) the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and
    - (ii) the borrower will make the payments under the agreement without suffering substantial hardship; and

- (b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that—
  - (i) any advertising —
    - (A) complies with the advertising standards set out in the regulations; and
    - (B) is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and
  - (ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and
  - (iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and
  - (iv) reasonable steps are taken to offer to the borrower information about the agreement in another language (language A) if—
    - (A) advertising that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and
    - (B) the steps are necessary to ensure that the borrower can reach an informed decision (for example, if the borrower may not have a good understanding of the language in which the lender is otherwise providing information to the borrower under this Act); and
- (c) assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—
  - (i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and
  - (ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and
- (d) treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including
  - (i) when breaches of the agreement have occurred or may occur or when other problems arise:
  - (ii) when a debtor under a consumer credit contract suffers unforeseen hardship (see section 55):
  - (iii) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner); and



- (e) ensure, in the case of an agreement to which Part 5 applies, that—
  - (i) the agreement is not oppressive;
  - (ii) the lender does not exercise a right or power conferred by the agreement in an oppressive manner;
  - (iii) the lender does not induce the borrower to enter into the agreement by oppressive means; and
- (f) meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008, which include—
  - (i) obligations in relation to disclosure, credit fees, unforeseen hardship applications, and credit repossession under this Act; and
  - (ii) prohibitions on false or misleading representations and unfair contract terms under the Fair Trading Act 1986; and
  - (iii) the guarantee that the service of providing credit and any other services will be carried out with reasonable care and skill under the Consumer Guarantees Act 1993.
- (4) The lender responsibilities are also that a lender must, in relation to a relevant guarantee that is taken by the lender,—
  - (a) make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship; and
  - (b) assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that—
    - (i) the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner; and
    - (ii) any information provided by the lender to the guarantor is not presented in a manner that is or is likely to be misleading, deceptive, or confusing; and
    - (iii) reasonable steps are taken to offer to the guarantor information about the guarantee in another language (**language A**) if—
      - (A) advertising about the agreement that is wholly or significantly in language A is being, or within the preceding 6 months has been, distributed to the public or a section of the public; and
      - (B) the steps are necessary to ensure that the guarantor can reach an informed decision (for example, if the guarantor may not have a good understanding of the language in which the lender is otherwise providing information to the guarantor under this Act); and

- (c) treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise; and
  - (d) ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—
    - (i) the guarantee is not oppressive:
    - (ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:
    - (iii) the lender does not induce the guarantor to give the guarantee by oppressive means; and
  - (e) meet all the lender's legal obligations to the guarantor, including under the Acts specified in subsection (3)(f).
- (5) The lender responsibilities are also that a lender must, in relation to a relevant insurance contract,—
- (a) make reasonable inquiries, before the contract is entered into, so as to be satisfied that it is likely that—
    - (i) the insurance provided under the contract will meet the borrower's requirements and objectives; and
    - (ii) the borrower will make the payments under the contract without suffering substantial hardship; and
  - (b) assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—
    - (i) any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and
    - (ii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.
- (5A) In subsections (3)(a), (4)(a), and (5)(a), the requirement to make **reasonable inquiries** so as to be satisfied of a matter includes a requirement to comply with regulations made under **section 138(1)(abe)**.
- (6) Subsections (3)(b)(iii) and (c)(ii), (4)(b)(ii), and (5)(b)(ii) do not apply to information that is subject to section 32(1).
- (8) The material changes for the purposes of subsection (3)(a) are—
- (a) the parties to the agreement agree to change the agreement by increasing a credit limit under the agreement:

- (b) the lender exercises a power under the agreement to increase a credit limit under the agreement:
- (c) the lender makes an additional advance that the lender did not take into account when previously satisfying itself as to the matters in subsection (3)(a).

## Part C: Content of Responsible Lending Code

### 9F Content of Responsible Lending Code

- (1) In order to achieve its purpose, the Responsible Lending Code may set out any, or all, of the following:
  - (a) the nature and extent of inquiries a lender should make before entering into an agreement, before a relevant guarantee is given, or before a relevant insurance contract is entered into:
  - (b) the processes, practices, or procedures that a lender should follow—
    - (i) to ensure that advertising for providing credit or finance under agreements complies with the advertising standards set in the regulations and is not, or is not likely to be, misleading, deceptive, or confusing to borrowers:
    - (ii) when making reasonable inquiries referred to in section 9C(3)(a), (4)(a), and (5)(a) so as to be satisfied of the matters referred to in those paragraphs and to comply with the regulations relating to those requirements:
    - (iii) to give the assistance referred to in section 9C(3)(b) and (c), (4)(b), and (5)(b) (including where the borrower or guarantor may not have a good understanding of the language in which the lender is otherwise providing information):
    - (iv) to ensure that the lender treats borrowers, guarantors, and their property (or property in their possession) reasonably and in an ethical manner:
    - (v) in the case of an agreement or a guarantee to which Part 5 applies, to ensure that the agreement or guarantee is not oppressive, the lender does not exercise a right or power conferred by the agreement or guarantee in an oppressive manner, and the lender does not induce the borrower to enter into the agreement, or the guarantor to give the guarantee, by oppressive means:
    - (vi) to promote or facilitate compliance with the legal obligations referred to in section 9C(3)(f) and (4)(e) (for example, by reference to compliance programmes):
    - (vii) to ensure that fees are not unreasonable in terms of section 41, 80, or 82:
  - (c) the circumstances in which the lender should require or recommend independent legal advice to be obtained:
  - (d) the processes, practices, or procedures that a lender should follow for the purposes of Part 3A:

- (da) the processes, practices, or procedures that a lender should follow for the purposes of debt collection:
  - (e) any other matter that promotes or facilitates the lender responsibility principles (set out in section 9C(2)) and that is not inconsistent with any other enactment.
- (2) The Code may also contain different provisions in relation to particular—
- (a) lenders or classes of lenders:
  - (b) borrowers or classes of borrowers:
  - (c) guarantors or classes of guarantors:
  - (d) agreements or classes of agreement.

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